



## **INFORMATIONAL MEMORANDUM**

**TO: Transportation and Infrastructure Committee**

**FROM: Joel Bush, Technology and Innovation Services Director**

**BY: Eric Compton, Franchise and Technology Specialist**

**CC: Mayor Ekberg**

**DATE: January 22, 2021**

**SUBJECT: Extenet Systems, Inc. Asset Sharing Agreement**

### **ISSUE**

Approve an Agreement between the City and Extenet Systems, Inc. granting the sharing of telecommunications assets in a mutually beneficial manner.

### **BACKGROUND**

Extenet is a partner in developing small cell 5G wireless facilities across the country. In order to facilitate the building of their infrastructure, Extenet wishes to utilize certain City assets (conduit) and in exchange provide access to their infrastructure (fiber) or other assets in a mutually beneficial manner. These agreements can help both Extenet and Tukwila save money and expedite telecommunications growth in the community.

### **DISCUSSION**

### **FINANCIAL IMPACT**

No direct negative cost to the budget will be brought. This agreement is intended to save money on projects while partnering with Extenet to share costs.

### **RECOMMENDATION**

Council is being asked to approve the Agreement allowing Extenet Systems, Inc. and consider this item on the Consent Agenda at the February 1, 2020 Regular Meeting.

### **ATTACHMENTS**

Extenet Asset Exchange Agreement

**THIS ASSET EXCHANGE LICENSE AGREEMENT** (hereinafter referred to as the “Agreement”) is made and entered into as of the date of the last signature below (the “Effective Date”), between ExteNet Systems, Inc., a Delaware corporation with primary offices at 3030 Warrenville Road, Suite 340, Lisle, Illinois 60532 (“ExteNet”), and City of Tukwila, a municipality in the State of Washington (“City”) ExteNet and City may be hereinafter referred to individually as “Party”, and collectively as “Parties.”

**WHEREAS**, each Party owns or has rights in Conduit or Fiber within the City and each Party wishes to exchange certain Conduit or Fiber from their respective Conduit or Fiber systems within the City boundaries, and enter into an agreement to facilitate future exchanges.

**NOW, THEREFORE**, for and in consideration of the mutual covenants and consideration set forth in this Agreement, the Parties do hereby agree as follows:

- 1. Definitions.** The following terms, whether in the singular or in the plural, when used in this Agreement shall have the meaning specified in this Section 1. Use of the word “or” when describing “Fiber or Conduit” is not intended to mean or convey that it is exclusively one or the other unless the context specifically requires.
  - 1.1 Authorizations: All governmental or municipal approvals and authorizations; all rights-of-way and pole attachment agreements; and all leases, licenses, consents or other agreements necessary for the Licensor to construct, install, maintain and repair its Conduit System and to license portions of the Conduit System to a third party.
  - 1.2 Asset: Conduit or Fiber within a Party’s Conduit System or otherwise agreed between the Parties.
  - 1.3 Asset Exchange Form (or “AEF”): The form exchanged between the Parties via email or hardcopy, to communicate and agree to information related to an Asset Request, Asset Use Authorization, and Notice of Asset Availability, as shown on Exhibit A.
  - 1.4 Asset Request: A formal request for a license to use Conduit or Fiber, within a specific portion of the other Party’s Conduit System (either the City Conduit System or the ExteNet Conduit System as defined), made by completion of the Asset Request section of an AEF.
  - 1.5 Asset Use Authorization: Unless rejected upon request, Licensor’s acceptance and grant to an Asset Request providing authorization to license specific Conduit or Fiber. The Asset Use Authorization is executed by completing the Asset Use Authorization section of the Asset Exchange Form.
  - 1.6 City Conduit System: Existing Conduit or Fiber, owned by City, as more particularly described on an AEF or exhibits attached thereto; provided that, subject to the terms of this Agreement, such Conduit or Fiber may be modified from time-to-time in City’s sole discretion provided such modifications do not impact Licensee use of the Licensed Conduit or Fiber unless otherwise permitted herein.
  - 1.7 Conduit: Conduit which (a) was installed for the purpose of, or capable of being used for, communication fiber installation in accordance with Bellcore Standards, (b) is located in the City, and (c) is owned by either ExteNet or City, as the context requires.
  - 1.8 Conduit System: Either the City Conduit System or the ExteNet Conduit System, as context requires.
  - 1.9 Fiber: dark (unlit) fiber optic cable of one or more fibers owned by either the City or ExteNet, as the case may be, and as specified in an AEF or exhibits attached thereto.



- 1.10 License or Licensed Asset: Asset Use Authorization by City or ExteNet, as the case may be, to use the Licensed Conduit or Fiber for the License Term.
- 1.11 License Term: The term of each license for use of Licensed Conduit or Fiber, as further defined in Article 6 of this Agreement.
- 1.12 Licensee: The Party authorized under this Agreement and an AEF to use Licensed Conduit or Fiber within the other Party's Conduit System.
- 1.13 Licensor: The Party granting a License pursuant to an Asset Use Authorization.
- 1.14 Notice of Asset Availability: Notice from Licensor to Licensee that the Licensed Conduit or Fiber meets the Specifications and is available for Licensee's use, provided by completion of the Notice of Asset Availability section of the Asset Exchange Form.
- 1.15 Specifications: The minimum specifications identified on an AEF that Licensed Conduit or Fiber must meet as a precondition to the Notice of Asset Availability.
- 1.16 ExteNet Conduit System: Existing Conduit or Fiber owned by ExteNet, as described on an AEF or exhibits attached thereto. on Exhibit A; provided that, subject to the terms of this Agreement, such Conduit or Fiber may be modified from time-to-time in ExteNet's sole discretion provided such modifications do not impact Licensee use of the Licensed Conduit or Fiber unless otherwise permitted herein.

## **2. Exchanging Assets.**

- 2.1 As set forth in an executed AEF, City agrees, subject to the terms and conditions of this Agreement, to grant a License to ExteNet to use available Conduit or Fiber within City's Conduit System, including the right and permission to access and use any City easement(s) that the City's Conduit System routes through. This only applies to those easements that the City is authorized to grant access to ExteNet and ExteNet receives permission to access from the City. As set forth in an executed AEF, ExteNet agrees, subject to the terms and conditions of this Agreement, to grant a License to City to use commercially available Conduit or Fiber within ExteNet's Conduit System. Nothing in this agreement shall purport to give the City the right to resell any Fiber it may acquire in this Agreement. Each segment of conduit or fiber strands licensed will entitle the Licensor to the same amount of conduit or fiber strands on the Licensee's Conduit System.
- 2.2 City and ExteNet agree that the assets to be exchanged must be available at the time of the AEF exchange.
- 2.3 City and ExteNet agree that the intent of the Parties is that the Licensed Assets exchanged between the Parties will remain balanced and approximately equal. The Parties agree that the initial AEF's executed by the Parties on the same date as the Effective Date are an equal exchange of Licensed Assets. Further AEF equity analysis will consider Licensed Asset type, length (on a linear foot or a mile-for-mile basis, whichever is most applicable to the request), capacity and location as agreed between the Parties. Licensed Assets within the central business area, will be calculated at twice its length for purposes of exchanges of Assets outside the central business area.
- 2.4 If the amount of a Licensed Asset that one Party has Licensed, as to Conduit to Conduit or Fiber to Fiber amounts, exceeds the amount of Licensed Asset that the other Party has Licensed, and the difference is greater than 15% ("Disparate Licensed Asset Amount"),

then the Party with excessive Licensed Asset will not request additional AEF until the Disparate Licensed Asset Amount is corrected (meaning less than 15%). Notwithstanding the foregoing, the Parties may agree to alternate consideration to correct a Disparate Licensed Asset Amount.

- 2.5 Either Party may relinquish its right to use any segment of Licensed Asset prior to the end of the License Term. If one Party relinquishes Licensed Asset which results in Disparate Licensed Asset Amount, then the Party with excessive Licensed Asset will not request additional AEF until the Disparate Licensed Asset Amount is corrected or the Parties otherwise agree.
- 2.6 Each Party will maintain a record of the Licensed Assets exchanged pursuant to this Agreement. Upon reasonable request by a Party, not greater than once per year, the Parties will meet to review and validate these records.
- 2.7 This agreement does not remove the requirement that ExteNet must obtain all permits or other approval as required by law to perform any work under this agreement. Prior to a completed exchange, if either Party is unable to obtain, through no fault of its own, permits or other approvals required to perform any work under a particular AEF, that request, and its corresponding exchange shall cease to exist and each Party shall return back into the position they were in before the agreement was made.
- 2.8 Following a completed exchange, if one Party loses the ability to maintain required rights for an exchanged Licensed Asset, then that Party shall pay the other party the fair market value for the corresponding Licensed Asset which was exchanged.

### **3. Asset Requests and Use Authorization.**

- 3.1 Submission of AEF. All requests for Licensed Assets shall be made utilizing a AEF, with each Party completing information as Licensor or Licensee, as applicable, and forwarding the AEF via email to both address of a Party as indicated below (two (2) required for back-up purposes):

If to ExteNet: [noc@extenetsystems.com](mailto:noc@extenetsystems.com)

If to City: [eric.compton@tukwilawa.gov](mailto:eric.compton@tukwilawa.gov)  
[joel.bush@tukwilawa.gov](mailto:joel.bush@tukwilawa.gov)

- 3.2 When one Party wishes to use Assets of the other Party, such Party will complete the Asset Request section of the AEF, and submit the form to the other Party's email addresses. Submission of an AEF to one email address but not both email addresses shall not, by itself, constitute a failure to properly submit an AEF.
- 3.3 Acceptance or Denial of AEF. Within fifteen (15) business days of receipt of a completed Asset Request, Licensor will complete the Asset Use Authorization section of the AEF and return the form to Licensee. Licensor's response will either authorize Licensee's use of the Asset upon Notice of Asset Availability or indicate denial of the Asset Request.
- 3.4 Notice of Asset Availability. Notice of Asset Availability can take place on the same date as the Asset Use Authorization if the Asset meets the Specifications on the same date. If the Notice of Asset Availability cannot take place on the same date as the Asset Use Authorization, Licensor shall send back the AEF without completion of the Notice of Asset Availability section. Licensor shall then promptly provide email notice to Licensee when the Asset is available, and Licensee shall send back the AEF for Licensor's completion of

the Notice of Asset Availability. In all cases, upon completion of the Notice of Asset Availability from Licensor, the License Term shall begin.

- 3.5 Licensor will use commercially reasonable efforts to ensure that the requested Asset complies with all applicable Specifications and ready for Licensee's use within thirty (30) days of date of an Asset Use Authorization.

#### **4. Access and Escort.**

- 4.1 Handholes and Manholes. Unless otherwise specifically agreed in an AEF, Licensee will install handholes and/or manholes as a means of accessing the Licensed Conduit or Fiber. Licensee shall be responsible for all "one-call" responses and cable locate services for the Licensed Conduit or Fiber. All costs associated with Licensee's access to the Licensed Conduit or Fiber will be borne by the Licensee. The City shall not be required to install handholes or manholes for Conduit that has been installed prior to the entry of this Agreement. If necessary, ExteNet may install handholes or manholes at its own cost.
- 4.2 Activities Around or In Licensed Assets. If Licensee's activities will be performed within four (4) feet of Licensor's Conduit System, Licensee must contact Licensor to schedule the activity at a mutually agreed time allowing for Licensor to provide an escort, at Licensor's discretion and at Licensee's cost. Escort services will be requested using the Request for Field Activity ("RFA") form attached as Exhibit B or such other form as mutually agreed in writing. For Fiber placement within a Licensed Conduit, a RFA shall be made. Licensor shall grant such access as agreed to in an RFA, provided however, that Licensor shall not delay such an access request by more than ten (10) business days of receipt of such request. Licensee shall be responsible for all costs, including Licensor's costs for an RFA for Fiber placement. Licensor's costs for RFA may include a fifteen percent (15%) markup over costs.
- 4.3 The Licensee shall have the right, but not the obligation, to supervise and oversee any work performed by the Licensor in or to the Licensee's facilities, at Licensee's cost.

#### **5. Repair and Maintenance**

- 5.1 If either Party wishes to perform any repairs or maintenance they must follow all state and local laws for any and all work within in the right of way or other locations that require approval by state and local governing bodies, this includes permits and other requirements. ExteNet shall use commercially reasonable efforts to cause the Licensed Assets to continue to meet the Specifications during the License Term. ExteNet shall perform all routine maintenance and operations for the shared conduit and fiber system at its own cost, provided that City shall reimburse ExteNet for its proportionate share of all emergency maintenance and repair costs including but not limited to all costs associated with "one-call" responses, cable locate services and placement of a locate wire for the Licensed Conduit or Fiber and any other repair costs incurred due to damage caused by the City, plus fifteen percent (15%). Proportionate share means the number of licensed fibers divided by the total amount of fibers for the particular segment.
- 5.2 Routine Maintenance. From time to time, at the ExteNet's reasonable discretion, and after adequate advance notice to the City (which shall be at least 72 hours), the ExteNet will schedule and perform specific periodic maintenance and repair checks and services on both the Licensed Assets. This maintenance shall be provided at no cost to the City.
- 5.3 Emergency Maintenance.

- (a) Within two (2) hours after a ExteNet receives a trouble report of imminent or actual failure or impairment of the Licensed Conduit or Fiber, the ExteNet shall commence all commercially reasonable efforts to repair such failure or impairment to cause the Licensed Conduit or Fiber to meet the Specifications. At a minimum, such commercially reasonable efforts shall include dispatching at least one service technician (or more if commercially reasonably prudent to do so) to the source of the reported problem.
- (b) Within four (4) hours after ExteNet receives a trouble report of the type described in section (a), upon the City's request, ExteNet shall provide adequate assurance that ExteNet is diligently pursuing remedial action. If the ExteNet fails to initiate and diligently pursue repair within six (6) hours after the trouble report, then the City may, but shall not be obligated to, effect reasonable repair or replacement to restore the Licensed Conduit or Fiber to the Specifications ("Self Help"). ExteNet shall reimburse the City for all reasonable costs and expenses for Self Help incurred within forty-five (45) days after receipt of an invoice which shall include backup documentation for all charges. If the City performs Self Help, the City shall be responsible to perform such Self Help in a professional and workmanlike manner in accordance with industry standards and if necessary shall indemnify ExteNet in accordance with 12.2.
- (c) If the City does not elect to repair the Licensed Conduit or Fiber pursuant to subsection (b), and ExteNet fails to restore the Licensed Conduit or Fiber to the Specifications within twelve (12) hours after the trouble report, then upon the City's request, ExteNet shall review its Conduit System and propose alternate Licensed Assets with the same end points and capacity at least equal to the capacity or fiber count of the failed Licensed Conduit or Fiber, if available. If such alternative Licensed Asset is not available, the City may terminate the Licensed Asset pursuant to the terms of this Agreement.
- (d) Notice of interruption arising from relocation, condemnations and Force Majeure (as defined in Section 14) events shall be treated as a trouble report for purposes of this Section 5 and shall require prompt notice via email to both address of a Party as indicated below (two (2) required for back-up purposes):

If to ExteNet: noc@extenetsystems.com

If to City: eric.compton@tukwilawa.gov  
joel.bush@tukwilawa.gov

**6. Term.** The term of this Agreement, shall begin on the Effective Date, and shall end on the expiration of the last AEF License Term. Each License Term shall begin upon receipt of Notice of Asset Availability, and shall end on the last day of the AEF License Term.

**7. Representations Regarding Authorizations.**

7.1 Licensor represents, warrants and covenants that:

- (a) it has obtained, and will use commercially reasonable efforts to maintain all Authorizations throughout any License Term; and
- (b) it has the full right and authority under the Authorizations to enter into this Agreement and perform its obligations hereunder, and the same will not violate the

Authorizations (with or without the giving of notice or the lapse of time or both) or require any consent, approval, filing or notice under the Authorizations or under



any provision of any law, rule or regulation, court order, judgment or decree applicable to the Licensor; and

- (c) it has no knowledge of any defect in the normal operating condition of the Conduit System that would have an adverse effect on the ability of the other Party to utilize Licensed Conduit or Fiber to provide telecommunications services to its customers; and
- (d) it will exercise its rights and perform its obligations hereunder only in accordance with all applicable laws, rules and regulations; and
- (e) it will perform all maintenance services in a professional and workmanlike manner in accordance with industry standards.

7.2 Licensee represents, warrants and covenants that:

- (a) Licensee's use of the Licensed Conduit or Fiber will be limited to the provision of communication services in accordance with all Federal, State and local laws, rules, regulations, codes, statutes and subject to all Authorizations; and
- (b) Licensee has obtained all rights of way, authorizations and consents necessary to use the Licensed Conduit or Fiber. Licensee will indemnify, defend and hold harmless Licensor from any claims related to its use of the Licensed Conduit or Fiber; and
- (c) it has the full right and authority under the Authorizations to enter into this Agreement and perform its obligations hereunder, and the same will not violate the Authorizations (with or without the giving of notice or the lapse of time or both) or require any consent, approval, filing or notice under the Authorizations or under any provision of any law, rule or regulation, court order, judgment or decree applicable to the Licensor; and
- (f) it will perform all work related to access and use of the Licensed Conduit or Fiber in a professional and workmanlike manner in accordance with industry standards.

## **8. Default and Termination.**

8.1 Neither Party shall be in default under this Agreement herein unless and until such Party has received written notice of such default from the other Party, and has failed to cure the default within thirty (30) days after receipt of such notice, except for a payment default which must be cured within ten (10) days after receipt of such notice. Notwithstanding, when a default (unrelated to payment) cannot reasonably be cured within such thirty (30) day period, the time for curing such default shall be extended for a period no longer than sixty (60) days from the date of the receipt of the default notice if the Party proceeds promptly to cure the default with due diligence.

8.2 Unless otherwise provided herein, a Party shall be in default if (i) such Party breaches any term or provision of this Agreement or fails to comply with the provisions of this License; (ii) such Party becomes insolvent; (iii) a petition under any of the bankruptcy laws is filed by or against such Party; (iv) such Party makes a general assignment for the benefit of creditors; or (v) a receiver, whether temporary or permanent, is appointed for the property of such Party or any part thereof.

- 8.3 Upon the failure by the defaulting Party to timely cure any default, the non-defaulting Party may (i) take such action as it determines, in its sole discretion, to be necessary to correct the default, and/or (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 notifies the defaulting Party in writing within fifteen (15) days of receipt of the defaulting Party's notice of cure.
- 8.4 In the event of a payment default which has not been cured, Licensor may suspend Licensee's use of the Licensed Conduit or Fiber, without further notice and by whatever means Licensor deems appropriate, until the payment default is cured and for as long as thirty (30) days from the date of notice. If the payment default has not been cured within such thirty (30) day period, then Licensor may immediately terminate this Agreement and pursue any legal remedies it may have under applicable law or principles of equity relating to Licensee's breach.
- 8.5 Notwithstanding the foregoing, no termination of this Agreement shall affect the rights or obligations of any Party hereto with respect to any payment hereunder for services rendered prior to the date of termination and the non-defaulting Licensee shall not be required to relinquish its rights in the Licensed Conduit or Fiber as a result of a Licensor's default and failure to cure.
- 8.6 City shall use the Licensed Assets for City's own use. Under no circumstances shall City resell, lease, license, provide an IRU, or otherwise provide use of Licensed Assets, to any third party. A violation of this Section 8.6 shall be grounds for immediate termination of the Licensed Asset.

## **9. Taxes.**

- 9.1 Each Party shall pay the taxes that apply to their use of facilities under this agreement. ExteNet shall have the ability to transfer, sell, assign, swap, exchange, lease, sublease, license, sublicense, resell or grant indefeasible or other rights of use in or to all or any part of the optical fiber strands it pulls within the Licensed Asset(s) it acquires under this Agreement as "dark fiber" as such term is commonly understood in the telecommunications industry. ExteNet's resell rights do not include the right to transfer bear legal title. ExteNet is responsible for any actions that may violate this Agreement by those entities that have been granted access or use of optical fiber strands by ExteNet.

## **10. Relocation of the Facilities.**

If the need arises either through law, permit, or other circumstances to relocate the Conduit System and/or Licensed Conduits or Fiber, or a portion thereof. Each Party shall be responsible for its proportionate share (as defined in Section 5.1) of relocation costs. Licensor shall give the Licensee at least three (3) months' prior notice, or as soon as practicable, of any relocation or of any governmental proceedings that might result in a relocation, or such lesser amount of notice as the Licensor receives from such governmental authority. Relocation costs means the net relocation costs adjusted for amounts Licensor may receive from any third-party.

## **11. Condemnation.**

- 11.1 If at any time during the Agreement Term, all or any significant portion of the Conduit System or the Licensed Conduit or Fiber shall be taken for any public or quasi public purpose by any authority by the exercise of the right of condemnation or eminent domain,

such a taking shall be an interruption of use that shall be handled in accordance with Section 5, Repair, Maintenance and Continuity.

- 11.2 Each Party shall notify the other Party immediately upon learning of any condemnation proceeding filed against its Conduit System which may impact the other Party's Licensed Conduit or Fiber.

## **12. Indemnification and Exclusion of Certain Damages.**

- 12.1 ExteNet shall defend, indemnify and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with its performance of this Agreement, except for injuries and damages caused by the sole negligence of the City.

The City shall defend, indemnify and hold ExteNet, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with its performance of this Agreement, except for injuries and damages caused by the sole negligence of ExteNet.

Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of ExteNet, its officers, officials, employees and volunteers and the City, its officers, officials, employees, and volunteers, ExteNet's liability hereunder shall be only to the extent of ExteNet's negligence and the City's liability hereunder shall be only to the extent of the City's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes ExteNet's and the City's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

- 12.2 Waiver of Consequential Damages. IN NO EVENT WILL EITHER PARTY BE LIABLE UNDER ANY CIRCUMSTANCES TO THE OTHER PARTY FOR SPECIAL, INDIRECT, PUNITIVE, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES OR LOSSES, INCLUDING LOST PROFITS, LOSS OF BUSINESS OPPORTUNITY OR OTHER SIMILAR DAMAGES RESULTING FROM OR ARISING OUT OF THIS AGREEMENT, BY STATUTE, IN TORT OR CONTRACT

## **13. Insurance.**

- 13.1 The parties agree that they shall procure and maintain for so long as that party is in use of the IRU Conduit or IRU Fiber, as the case may be, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of rights, privileges and authority granted to that party, its agents representatives or employees. The parties shall require that every contractor and subcontractor maintain substantially the same insurance coverage with substantially the same limits as required of that party. The parties shall procure insurance from insurers with a current A.M. Best rating of not less than A-VII. ExteNet shall provide a copy of a certificate of insurance and additional insured endorsement to the City for its inspection at the time of or prior to acceptance of this Agreement. The parties shall maintain insurance that includes:

- (a) Automobile Liability insurance with limits no less than \$2,000,000 combined single limit per occurrence for bodily injury and property damage. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form that provides equivalent liability coverage.

- (b) Commercial General Liability insurance, written on an occurrence basis with limits no less than \$3,000,000 per occurrence and \$5,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; premises; operations; independent contractors; stop gap liability; personal injury; products and completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability. Commercial General Liability insurance shall be written on Insurance Services Office (ISO) occurrence form CG 00 01 and shall cover products liability. The City shall be named as an additional insured under Grantee's Commercial General Liability insurance policy using ISO Additional Insured-State or Political Subdivisions-Permits CG 20 12 or a substitute endorsement providing equivalent coverage;
  - (c) Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington. No deductible is presently required for this insurance; and
  - (d) Umbrella liability policy with limits not less than \$1,000,000 per occurrence and \$5,000,000 in the aggregate.
- 13.2 Maintenance of insurance shall not be construed to limit the liability of either party to the coverage provided by such insurance, or otherwise limit a party's recourse to any remedy available at law or equity. Further, a party's maintenance of insurance policies required by this agreement shall not be construed to excuse unfaithful performance by that party.
- 13.3 If the ExteNet maintains higher insurance limits than the minimums shown above, the City shall be insured for the full available limits of Commercial General and Excess or Umbrella liability maintained by the ExteNet, irrespective of whether such limits maintained by ExteNet are greater than those required by this contract or whether any certificate of insurance furnished to the City evidences limits of liability lower than those maintained by ExteNet.
- 13.4 ExteNet shall provide the City and all Additional Insureds for this work with written notice of any policy cancellation within two business days of their receipt of such notice.
- 13.5 Failure on the part of the ExteNet to maintain the insurance as required shall constitute a material breach of contract, upon which the City may, after giving five business days notice to ExteNet to correct the breach, immediately terminate the contract or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the City on demand, or at the sole discretion of the City, offset against funds due ExteNet from the Public Entity.

**14. Force Majeure.**

Neither party shall be liable to the other or deemed in breach or default for any failure or delay in performance under this Agreement during the time and to the extent its performance is prevented by reasons of Force Majeure. For the purposes of this Agreement, Force Majeure means an occurrence that is beyond the reasonable control of and without fault or negligence of the party claiming force majeure and which, by exercise of due diligence of such party, could not have been prevented or overcome. Force Majeure shall include natural disasters, including fire, flood, earthquake, windstorm, avalanche, mudslide, and other similar events; acts of war or civil unrest when an emergency has been declared by appropriate governmental officials; acts of civil or military authority; freight embargoes; epidemics; quarantine restrictions; labor strikes; boycotts; terrorist acts; riots; insurrections; explosions; and nuclear accidents. A party claiming suspension or termination of its obligations due to force majeure shall give the other party prompt written notice, but no more than fourteen (14) working days after the event, of the impediment and its effect

on the ability to perform; failure to provide such notice shall preclude recovery under this provision. Such delay shall cease as soon as practicable and written notification of same shall be provided. The time of completion shall be extended by Agreement modification for a period of time equal to the time that the results or effects of such delay prevented the delayed party from performing in accordance with this Agreement.

**15. Assignment.**

City shall use the Licensed Conduit or Fiber for City's own use. Under no circumstances shall City resell, lease, license, provide an IRU, or otherwise provide use of Licensed Conduit or Fiber Stands, to any third party. Notwithstanding, ExteNet may assign this Agreement in its entirety without the City's consent, to an entity in which such ExteNet or its parent company directly or indirectly owns a majority of the voting interests, or to any person, firm or corporation into or with which it may be merged or consolidated or that purchases all or substantially all of ExteNet's assets by providing notice of such assignment to the City.

**16. Notice.**

16.1 Other than notice for AEF and maintenance, all other notices, to be effective, must be in writing and delivered by pre-paid commercial overnight delivery service, or by first class mail, return receipt requested, addressed as follows:

If to ExteNet:                   ExteNet Systems. Inc.  
  ATTN: CFO  
  3030 Warrenville Rd, Suite 340  
  Lisle, IL 60532

With copy to General Counsel at same address  
Notice@extenetsystems.com

If to City:                        CITY of Tukwila  
  ATTN: IT Manager  
  6300 Southcenter Blvd  
  Tukwila, WA 98168

Either Party may change its notice address(es) by written notice to the other Party.

16.2 Notice shall be effective on the date of the addressee's receipt or refusal, as the case may be.

**17. Dispute Resolution and Governing Law.**

In the event of any claim or dispute under or in connection with this Agreement, the Parties shall negotiate in good faith to resolve the claim or dispute or, upon the failure to resolve such claim or dispute through good faith negotiations, this Agreement shall be governed by and construed in accordance with the laws of the State of Washington without giving effect to the principles of conflicts of laws. Venue for any dispute arising under this Agreement shall be in Pierce County Superior Court.

**19. Miscellaneous.**

This Agreement, including all Exhibits, sets forth the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior understandings and agreements on such subject

matter. No amendment or modification to this Agreement shall be valid unless in writing and signed by both Parties. The only relationship between the Parties is that of licensor and licensee with respect to the Licensed Conduit, and otherwise as independent contracting Parties, and specifically, but without limitation, the Parties are not partners in any undertaking. THIS AGREEMENT SHALL BE INTERPRETED AND ENFORCED UNDER THE LAWS OF WASHINGTON WITHOUT REGARD TO CONFLICTS OF LAWS. If any provision of this Agreement is unenforceable, it shall be deemed stricken from this Agreement and shall have no effect on any other provision. This Agreement shall be binding upon and inure to the benefit of Parties and their respective representatives, successors and assigns. Headings are for convenience only and shall not affect the interpretation of this Agreement. This Agreement shall become effective only upon execution by both Parties. Both Parties have been represented by counsel and neither Party shall be deemed to be the drafter of this document for purposes of interpreting an ambiguity against the drafter. There are no third party beneficiaries of this Agreement. "Days" shall mean calendar days, unless otherwise specified. Business days shall mean all days other than Saturdays, Sundays and Federal holidays. No waiver shall be valid unless in writing and signed by the Party against whom enforcement is sought.

- 20. Waiver. No delay or omission by either party to exercise any right or power occurring upon non-compliance or failure of performance by the other party shall impair that right or power or be construed to be a waiver thereof. A waiver by either party of any of the covenants, conditions or agreements to be performed by the other party shall not be construed to be a general waiver of any such covenants, conditions or agreements, but the same shall be and remain at all times in full force and effect.
  
- 21. Severability. In the event any term, covenant or condition of this Agreement, or the application of such term covenant or condition, shall be held invalid as to any person or circumstance by any court having jurisdiction, all other terms, covenants and conditions of this Agreement and their application shall not be affected thereby, but shall remain in force and effect unless a court holds that the invalid term, covenant or condition is not separable from all other terms covenants and conditions of Agreement.

IN WITNESS WHEREOF, the Parties have caused this Asset Exchange Agreement to be executed by their respective duly authorized representatives as of the day and year first above written.

**ETEXTENET SYSTEMS, INC.**

**CITY OF TUKWILA**

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

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

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

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

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT A  
ASSET EXCHANGE FORM**

This Asset Exchange Form shall be processed in accordance with the Asset Exchange Agreement by and between ExteNet and City of Tukwila dated \_\_\_\_\_. If a License is granted hereunder, the license shall be for the term listed below.

<b>ASSET REQUEST</b> (completed by the Licensee):	
Requesting Party:	
Date:	
Contact Person:	
Phone:	EMAIL:
AEF Term:	
AEF Renewal Term:	
<b>Conduit Request</b>	
Specifications:	
A Location:	
Z Location:	
Number of Conduit:	
Size of Conduit:	
Access Points:	
<b>Fiber Request</b>	
Specifications (fiber type, requirements, etc.):	
A Location:	
Z Location:	
Fiber Count:	
Is Fiber within above Conduit?:	
Splice Points:	
<b>ASSET REQUEST CONFIRMATION</b> (completed by the Licensee):	
Date:	
Signature:	

<b>ASSET USE AUTHORIZATION (LICENSE)</b> (completed by the Licensor):	
Party:	
Date:	
Contact Person:	
Phone:	EMAIL:
<input type="checkbox"/> <b>License Granted</b> <input type="checkbox"/> <b>License Denied</b> (check one)	
If Granted, Approximate Availability Date:	



(Licensor to attach a drawing to this AEF of the License, including access and splice points.)	
Licensor Signature:	
Printed Name:	
Title:	
Date:	
<b>NOTICE OF ASSET AVAILABILITY</b> (completed by the Licensor):	
Date of Asset Availability:	
Licensor Signature:	
Printed Name:	
Title:	
Date:	

**EXHIBIT B**

**TO BE AGREED UPON BY THE PARTIES. FORM MAY INCLUDE:**

City shall coordinate all activity on a Licensed Asset with ExteNet's Network Control and Management at\_\_\_\_\_.

ExteNet shall coordinate all activity on a Licensed Asset with City's Network Operations Center at 1-800-\_\_\_\_-\_\_\_\_\_.

<b>Originator:</b>	<b>Phone #:</b>	<b>Date Originated:</b>	
<b>Responsible Party:</b>	<b>Phone #:</b>	<b>Cell/Pager#:</b>	
<b>Additional Vendor Contact Info:</b>		<b>Phone:</b>	
Maintenance Spans affected:			
<b>Job Locations:</b>		<b>City:</b>	<b>State:</b>
<b>Brief Job Description:</b>			

\*\*\*\*\*ACTIVITY CLASSIFICATION\*\*\*\*\*

<b>Date requested:</b>	<b>Time:</b>	<b>Expected Duration of Activity:</b>
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\*\*\*\*\*APPROVALS\*\*\*\*\*

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