

**INTERGOVERNMENTAL AGREEMENT
BETWEEN CLACKAMAS COUNTY
AND THE CITY OF SANDY**

THIS AGREEMENT (“Agreement”) is entered into and by and between Clackamas County (“County”), a political subdivision of the State of Oregon, and the City of Sandy (“City”), a political subdivision of the State of Oregon, pursuant to ORS Chapter 190 (Cooperation of Governmental Units), collectively referred to as the “Parties” and each a “Party.”

RECITALS

WHEREAS, authority is conferred under ORS Chapter 190 to local governments to enter into agreements for the performance of any and all functions and activities that a party to the agreement, its officers or agencies have authority to perform; and

WHEREAS, the parties desire to partner for a fiber based business internet service whereby the City will serve as the Internet Service Provider (“ISP”) and the County will construct the necessary infrastructure and provide the dark fiber connections to the City’s customers (the “Project”).

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

1. **Term.** This Agreement shall be effective upon execution by both Parties, and shall continue for a term of five (5) year from the date of execution. This Agreement shall automatically renew for an additional one (1) year term each year thereafter unless otherwise terminated by the parties, but in no event shall the term of this Agreement exceed a maximum of 10 years from date executed.
2. **Rights and Obligations of the County.**
 - A. Upon written request from the City, County may construct the necessary infrastructure and install a dark fiber connection to customers who have agreed to have the City serve as an ISP. Infrastructure construction shall be performed by County in its sole discretion. The County is and will remain the owner of any infrastructure and dark fiber installed as part of said construction. Prior to County performing such construction, the County will consult with the City to ensure that the specifications of the infrastructure and fiber are compatible with City’s system. Prior to the County performing the construction, the City shall ensure the following construction and installation requirements are satisfied for each property to be served:
 - i. The City has secured all easements, leases, licenses, authorizations, or other agreements from property owner as determined necessary by County to allow County to use existing pathways to, into and within each site to the demarcation point for service, and to otherwise perform the infrastructure construction.
 - ii. A path acceptable to the County is provided for the fiber optic cable from the point of entry into the service site to the termination panel or CSP (Customer Splice Point) and into the home demarcation that complies with all applicable building, electrical, fire and related codes.
 - iii. The County and its employees, agents, lessees, officers and its authorized vendors, upon

reasonable notice, have the right to reasonable ingress and egress into and out of the properties and buildings in connection with the provision of service.

- B. Following construction of such infrastructure, and throughout the term of this Agreement, County shall maintain and repair, as necessary, all County-owned infrastructure necessary to provide service to each customer receiving service pursuant to this Agreement. County shall have the sole discretion to determine how to maintain said infrastructure and make the required repairs, provided that (1) the repair is sufficient to restore service at a level equal to or better than the level that existed prior to the damage necessitating the repair, and (2) the repair is completed promptly, and in any event no later than forty-eight (48) hours after County is notified of the need for repair.
- C. Subject to the availability of funds, as determined by the County in its sole administrative discretion, the County will provide up to but not to exceed \$3,000.00 for the expansion of the fiber network to serve each customer. If the construction cost will exceed \$3,000.00, the City will collect the additional funds from the customer and distribute the funds to County either in lump sum or an agreed amount over the term of the customer's service order.
- D. County will secure all franchises, licenses, or other authorizations necessary for operating in the appropriate utility right of way ("ROW"). County will be responsible for paying all ROW specific fees and taxes. City will collect those fees and taxes on the County's behalf and transmit to County.

3. Rights and Obligations of City.

- A. If County performs the infrastructure construction necessary to serve a customer, the City will provide ISP services to the customer pursuant to those terms and conditions as may be mutually agreed to between the City and the customer. County will have no involvement or interest in, and will not be a party to, any such agreement entered into by and between City and the customer.
- B. In serving as an ISP, City shall provide all commercially reasonable ISP services including, but not limited to, IP addresses, billings, and general customer service. Customer service will, at a minimum be available Monday through Friday from 9 am to 5 pm, excluding federal holidays.
- C. As of the date of this Agreement, City will provide ISP services to customers under the following packages:
 - i. Gigabit Business Dedicated Internet Access (DIA) at a minimum cost of \$225.00 per month per customer for a symmetrical 1 Gig service. Of the fees actually collected from each customer each month, \$105.00 will be distributed by the City to the County. Minimum cost does not include any fees or taxes that may be imposed on City or County, which may be added to the customer's cost.
 - ii. Half Gigabit Business Shared Internet Access at a minimum cost of \$100.00 per month per customer for symmetrical 500Mbps service. Of the fees actually collected from each customer each month, \$48 will be distributed by the City to the County. Minimum cost does not include any fees or taxes that may be imposed on the City or County, which may be added to the customer's cost.
 - iii. Lottery Contract Site is a specific tier designated for Oregon Lottery circuits and offer internet access at a minimum of \$80 per month per Oregon Lottery site for symmetrical 250Mbps service. Of the fees actually collected for each Oregon Lottery site, \$40 will be distributed by the City to the County. Minimum cost does not include any fees or taxes that may be imposed on the City or County, which may be added to the customer's cost.

- D. The City reserves the right to upsell, or provide over-the-top services to customers including but not limited to: phone service, television and network services, so long as it does not require any additional dark fiber connections. Any services requiring dark fiber must be mutually agreed upon between both parties.
 - E. Rate increases shall occur no more than once per year and shall be mutually agreed upon by both parties and memorialized in an amendment to this agreement, unless the increase is (1) related to a government-imposed fee or tax., or (2) an amount not related to a government-imposed fee or tax which is not greater than three percent (3%) per year.
4. **Location.**
- A. The rights and obligations of the Parties pursuant to this Agreement apply only in the geographic area served by the Clackamas County fiber network.
5. **Representations and Warranties.**
- A. *City representations and warranties:* City represents and warrants to County that City has the power and authority to enter into and perform this Agreement, and this Agreement, when executed and delivered, shall be a valid and binding obligation of City enforceable in accordance with its terms.
 - B. *County Representations and Warranties:* County represents and warrants to City that County has the power and authority to enter into and perform this Agreement, and this Agreement, when executed and delivered, shall be a valid and binding obligation of County enforceable in accordance with its terms.
 - C. The warranties set forth in this section are in addition to, and not in lieu of, any other warranties provided.
6. **Termination.**
- A. The County and City, by mutual written agreement, may terminate this Agreement at any time.
 - B. Either Party may terminate this Agreement for convenience upon sixty (60) day's written notice to the non-terminating Party.
 - C. Either the County or City may terminate this Agreement in the event of a breach of the Agreement by the other. Prior to such termination, however, the Party seeking the termination shall give the other Party written notice of the breach and of the Party's intent to terminate. If the breaching Party has not entirely cured the breach within fifteen (15) days after such notice, or other time as may be agreed between the parties in writing, then the Party giving notice may terminate the Agreement at any time thereafter by giving written notice of termination stating the effective date of the termination. If the default is of such a nature that it cannot be completely remedied within such fifteen (15) day period, this provision shall be complied with if the breaching Party begins correction of the default within the fifteen (15) day period and thereafter proceeds with reasonable diligence and in good faith to effect the remedy as soon as practicable. The Party giving notice shall not be required to give more than one (1) notice for a similar default in any twelve (12) month period.
 - D. The County or City shall not be deemed to have waived any breach of this Agreement by the other Party except by an express waiver in writing. An express written waiver as to one breach shall not be deemed a waiver of any other breach not expressly identified, even though the other breach is of the same nature as that waived.

- E. Either Party may terminate this Agreement in the event the Party fails to receive expenditure authority sufficient to allow that Party, in the exercise of its reasonable administrative discretion, to continue to perform under this Agreement, or if federal or state laws, regulations or guidelines are modified or interpreted in such a way that performance under this Agreement is prohibited or a Party is prohibited from paying for such work from the planned funding source.
- F. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.
- G. Upon expiration or termination of this Agreement, regardless of cause, County's obligations under this Agreement shall nevertheless remain in full force and effect with regard to any customers then being served under this Agreement, for a period of time equal to the term of any service order then in effect for such customer, or three (3) years, whichever is less. Upon receipt of a notice to terminate, for any reason, City shall not enroll any additional customers for the services described in this Agreement.

7. Indemnification.

- A. Subject to the limits of the Oregon Constitution and the Oregon Tort Claims Act or successor statute, the County agrees to indemnify, save harmless and defend City, its officers, elected officials, agents and employees from and against all costs, losses, damages, claims or actions and all expenses incidental to the investigation and defense thereof arising out of or based upon damages or injuries to persons or property caused by the negligent or willful acts of the County or its officers, elected officials, owners, employees, agents, or its subcontractors or anyone over which the County has a right to control.
- B. Subject to the limits of the Oregon Constitution and the Oregon Tort Claims Act or successor statute, City agrees to indemnify, save harmless and defend the County, its officers, elected officials, agents and employees from and against all costs, losses, damages, claims or actions and all expenses incidental to the investigation and defense thereof arising out of or based upon damages or injuries to persons or property caused by the negligent or willful acts of City or its officers, elected officials, owners, employees, agents, or its subcontractors or anyone over which City has a right to control.

8. **Insurance.** The Parties agree to maintain insurance levels sufficient to cover the obligations agreed to in this Agreement.

9. Party Contacts

- A. Duke Dexter or his designee will act as liaison for the County.

Contact Information:

Duke Dexter
121 Library Court
Oregon City, Oregon 97045
ddexter@clackamas.us
Fax: 503-655-8255

Greg Brewster or his designee will act as liaison for City.

Contact Information:

Greg Brewster
39250 SE Pioneer Blvd
Sandy, Oregon 97055
gbrewster@ci.sandy.or.us
(503) 489-0937

- B. Either Party may change the Party contact information, or the invoice or payment addresses, by giving prior written notice thereof to the other Party at its then current notice address.

10. General Provisions

- A. **Oregon Law and Forum.** This Agreement, and all rights, obligations, and disputes arising out of it will be governed by and construed in accordance with the laws of the State of Oregon without giving effect to the conflict of law provisions thereof. Any claim between County and City that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the Circuit Court of Clackamas County for the State of Oregon; provided, however, if a claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this section be construed as a waiver by either Party of any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any claim or from the jurisdiction of any court. City, by execution of this Agreement, hereby consents to the in personam jurisdiction of the courts referenced in this section.
- B. **Compliance with Applicable Law.** Both Parties shall comply with all applicable local, state and federal ordinances, statutes, laws and regulations. All provisions of law required to be part of this Agreement, whether listed or otherwise, are hereby integrated and adopted herein. Failure to comply with such obligations is a material breach of this Agreement.
- C. **Non-Exclusive Rights and Remedies.** Except as otherwise expressly provided herein, the rights and remedies expressly afforded under the provisions of this Agreement shall not be deemed exclusive, and shall be in addition to and cumulative with any and all rights and remedies otherwise available at law or in equity. The exercise by either Party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other remedies for the same default or breach, or for any other default or breach, by the other Party.
- D. **Access to Records.** The Parties shall retain, maintain, and keep accessible all records relevant to this Agreement ("Records") for a minimum of six (6) years, following Agreement termination or full performance or any longer period as may be required by applicable law, or until the conclusion of an audit, controversy or litigation arising out of or related to this Agreement, whichever is later. The Parties shall maintain all financial records in accordance with generally accepted accounting principles. All other Records shall be maintained to the extent necessary to clearly reflect actions taken. During this record retention period each Party shall permit the other Parties' authorized representatives' access to the Records at reasonable times and places for purposes of examining and copying.
- E. **Debt Limitation.** This Agreement is expressly subject to the debt limitation of Oregon counties set forth in Article XI, Section 10, of the Oregon Constitution, and is contingent

upon funds being appropriated therefore. Any provisions herein which would conflict with law are deemed inoperative to that extent.

- F. **Severability.** If any provision of this Agreement is found to be unconstitutional, illegal or unenforceable, this Agreement nevertheless shall remain in full force and effect and the offending provision shall be stricken. The Court or other authorized body finding such provision unconstitutional, illegal or unenforceable shall construe this Agreement without such provision to give effect to the maximum extent possible the intentions of the Parties.
- G. **Integration, Amendment and Waiver.** Except as otherwise set forth herein, this Agreement constitutes the entire agreement between the Parties regarding its subject matter. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of either Party to enforce any provision of this Agreement shall not constitute a waiver by such Party of that or any other provision.
- H. **Interpretation.** The titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.
- I. **Independent Contractor.** Each of the Parties hereto shall be deemed an independent contractor for purposes of this Agreement. No representative, agent, employee or contractor of one Party shall be deemed to be a representative, agent, employee or contractor of the other Party for any purpose, except to the extent specifically provided herein. Nothing herein is intended, nor shall it be construed, to create between the Parties any relationship of principal and agent, partnership, joint venture or any similar relationship, and each Party hereby specifically disclaims any such relationship.
- J. **No Third-Party Beneficiary.** City and County are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.
- K. **Assignment.** Neither Party shall assign or transfer any of its interest in this Agreement, by operation of law or otherwise, without obtaining prior written approval from the other Party, which shall be granted or denied in that Party's sole and absolute discretion. One Party's consent to any assignment shall not relieve the other Party of any of its duties or obligations under this Agreement.
- L. **Counterparts.** This Contract may be executed in several counterparts (electronic or otherwise), each of which shall be an original, all of which shall constitute the same instrument.
- M. **Survival.** The provisions of Sections 5, 7, and 10 shall survive the termination of this Agreement.

- N. **Necessary Acts.** Each Party shall execute and deliver to the others all such further instruments and documents as may be reasonably necessary to carry out this Agreement.
- O. **Successors in Interest.** The provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective authorized successors and assigns.
- P. **Force Majeure.** Neither City nor County shall be held responsible for delay or default caused by events outside of City's or County's reasonable control including, but not limited to, fire, terrorism, riot, acts of God, or war.
- Q. **Confidentiality.** The Parties and their employees or agents may, in the course of this Agreement, be exposed to or acquire material identified as confidential information. Such information shall be deemed confidential information of the Party identifying it as such ("Confidential Information"). The Parties agree to hold Confidential Information in strict confidence, using at least the same degree of care that each Party uses in maintaining the confidentiality of its own confidential information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties or use Confidential Information for any purpose unless specifically authorized in writing under this Agreement.
- R. **Notice.** Any notice required to be provided under this Agreement shall be provided to the Party Contact at the address specified in Section 9 of this Agreement. Notices shall be made by personal service, in which case they are effective on the date of service, or by certified mail, in which case they are effective on the date of delivery, or if delivery is refused, upon the date of delivery refusal.
- S. **Dispute Resolution.** Should any dispute arise between the parties, it is agreed that such dispute will be submitted to a mediator prior to any litigation and the parties hereby expressly agree that no claim or dispute arising under the terms of this Agreement shall be resolved other than first through mediation and only in the event said mediation efforts fail, through litigation. The parties shall exercise good faith efforts to select a mediator who shall be compensated equally by both parties. Mediation will be conducted in Portland, Oregon, unless both parties agree in writing otherwise. Both parties agree to exercise good faith efforts to resolve disputes covered by this section through this mediation process. If a party requests mediation and the other party fails to respond within ten (10) calendar days, or if the parties fail to agree on a mediator within ten (10) calendar days, a mediator shall be appointed by the presiding judge of the Clackamas County Circuit Court upon the request of either party. The parties shall have any rights at law or in equity with respect to any dispute not covered by this Section.
- T. **No Attorney Fees.** In the event any arbitration, action or proceeding, including any bankruptcy proceeding, is instituted to enforce any term of this Agreement, each party shall be responsible for its own attorneys' fees and expenses.

IN WITNESS HEREOF, the Parties have executed this Agreement by the date set forth opposite their names below.

Clackamas County

Chair, Board of County Commissioners

Date

Recording Secretary

City of Sandy

By:

Date