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PUBLIC UTILITY DISTRICT No. 1 *of Whatcom County*

Agenda for the Regular Meeting of February 25, 2020 8:00 a.m. at the PUD Office

1. Call to Order | Pledge of Allegiance
2. Approval of Agenda
3. Public Comment
4. Consent Agenda
 - a) Approval of Meeting Minutes of the Regular Meeting of February 11, 2020
 - b) Approval of Claims for February 25, 2020
5. Old Business
 - a) Revised Expense/Per Diem Reimbursement Form
6. New Business
 - a) Approve Rebuild of High Head Pump No. 4 at Water Plant No. 1
 - b) Approve Professional Services Agreement with Performance Information Technologies
 - c) Approve Amendment No.4 to Bender Park Communications Tower Agreement with New Cingular Wireless PCS, LLC
 - d) Call for Special Meeting on March 17
7. General Manager Report
8. Commissioner Reports
9. Executive Session: Per RCW 42.30.110(1)(i) Potential Litigation
10. Adjourn

Next Commission Meetings

March 10 and 24, 2020

*All meetings begin at 8:00 a.m. at PUD Administration Office
1705 Trigg Road, Ferndale, WA unless other location announced.*

(360) 384-4288 | www.pudwhatcom.org

Mission Statement

Public Utility District No. 1 of Whatcom County is a steward of water and energy resources providing locally controlled utility services and resource protection for the benefit of the residents, businesses and agricultural community of greater Whatcom.

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MINUTES OF THE REGULAR MEETING OF THE COMMISSION

February 11, 2020

1. Call to Order | Pledge of Allegiance

The regular meeting of the Board of Commissioners of Public Utility District No. 1 of Whatcom County was called to order at 8:00 a.m. by Commissioner Mike Murphy and Pledge of Allegiance recited. Said meeting was open to the public and notice thereof had been given as required by law. Those present included Commissioner Atul Deshmane and Legal Counsel Jon Sitkin. Staff: Steve Jilk, General Manager; Brian Walters, Assistant General Manager; Ann Grimm, Administrative Assistant; Annette Smith, Director of Finance; Duane Holden, Director of Utility Operations; Alec Strand, Project Manager; Mike Macomber, IT/SCADA Technician; Aaron Peterson, IT/SCADA Technician; and Traci Irvine, Accountant I.

Public attending: Rick Maricle, Public
Lauren Turner, Phillips 66
Dave Olson, Citizen
Carole Perry, Citizen
Max Perry, Citizen
Robin Dexter, Environmental Working Group
Todd Lagestee, Citizen

2. Approval of Agenda

ACTION: Commissioner Deshmane motioned to approve today's agenda. Commissioner Murphy second the motion. Motion passed unanimously.

3. Public Comment

Robin Dexter said that while he appreciates the public comment period at the beginning of the meeting he would like to see an additional comment period towards the end of the agenda in case people want to make comments about topics mentioned during the meeting. Commissioner Murphy agreed to an additional public comment period prior to today's executive session.

As such, Commissioner Murphy recalled the above action on approval of the agenda. Deshmane made the motion to ADD PUBLIC COMMENT PERIOD PRIOR TO AGENDA ITEM 9/EXECUTIVE SESSION FOR THIS MEETING ONLY. Commissioner Murphy second the motion. Motion passed unanimously.

Carole Perry asked Deshmane about the Planning Commission's upcoming meeting regarding the Cherry Point amendments. Deshmane replied that the next meeting is February 13 and he is happy to meet with Perry beforehand to hear her comments.

Rick Maricle mentioned a 169-megawatt community solar project near Las Vegas. The 7,000-acre project has destroyed the wildlife/environment. Renewable energy is not without adverse impacts, which will be substantial in going forward.

Max Perry commented that the carbon blades from generators are non-recyclable and becomes part of the landfill – these are consequences too.

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4. Consent Agenda

- a. Approval of the Meeting Minutes of January 28, 2020 as presented; and,
- b. Approval of the Claims of February 11, 2020:

VENDOR NAME	AMOUNT
3-D CORPORATION	344.68
APPLIED DIGITAL IMAGING	4.89
APSCO, LLC	23,198.05
ARBITRAGE GROUP INC.	2,000.00
BAY CITY SUPPLY	279.14
BHAM WHATCOM CHAMBER OF COMMERCE	330.00
BIRCH EQUIPMENT COMPANY	8,603.62
CDW/COMPUTER DISCOUNT WAREHOUSE	2,142.65
CENTRAL WELDING SUPPLY	77.12
CHMELIK SITKIN & DAVIS	8,692.51
CORNERSTONE MANAGEMENT, INC.	3,124.00
FASTENAL	112.48
FERGUSON ENTERPRISES, INC	164.12
FERNDALE ACE HARDWARE	54.65
FRONTIER	1,383.23
GENEVA CONSULTING	1,149.75
GRAINGER	226.10
GUARDIAN SECURITY SYSTEMS, INC	296.21
HARDWARE SALES, INC	288.11
HEALTH PROMOTIONS NORTHWEST	90.00
K ENGINEERS, INC.	1,650.00
KCDA PURCHASING COOPERATIVE	113.65
LITHTEX NW LLC	105.79
MASSMUTUAL RETIREMENT SVCS LLC	11,999.99
MORTIMER, TOM	3,533.75
NORTHWEST MOWING & GARDENING	514.54
NW RIVERPARTNERS	3,940.00
PITNEY BOWES RESERVE ACCOUNT	500.00
PLATT ELECTRIC SUPPLY CO	2,841.04
PUD #1 OF WHATCOM COUNTY	6,548.05
PUGET SOUND ENERGY, INC	6,200.01
REGENCE BLUE SHIELD	38,901.73
REISNER DISTRIBUTION, INC	1,031.28
RICOH USA	360.18
SSC - SANITARY SERVICE COMPANY	479.23
TEAMSTER LOCAL #231	544.00
THRESHOLD DOCUMENTS	8.70
TRIVAN TRUCK BODY	8,090.54
TYLER TECHNOLOGIES-INCODE	12,085.49
UNITED WAY OF WHATCOM COUNTY	420.00
UTILITIES UNDERGROUND LOCATION	9.03
VERIZON WIRELESS	1,512.16
WA PUBLIC UTILITY DISTRICTS ASSOCIATION	15.00
WASHINGTON DENTAL SERVICE	2,768.10
WASHINGTON TEAMSTERS WELFARE	11,875.15
WATERHOUSE ENVIRONMENTAL SERVICES CORP	35,010.30
WHATCOM JANITORIAL	1,250.00

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WHISTLE WORKWEAR
GRAND TOTAL

577.12
\$205,446.14

ACTION: Commissioner Deshmane motioned to APPROVE THE CONSENT AGENDA. Commissioner Murphy second the motion. Motion passed unanimously.

5. Old Business

Deshmane will be in Olympia on February 12 for WPUDA's legislative action day. With the February 7 cutoff date, some bills have moved forward, others have dropped off; however, there is nothing specific to report. He will discuss further with Jilk if there are other topics for him to discuss in Olympia.

6. New Business

None.

7. General Manager Report

The District received a copy of the response letter from Department of Ecology to the Lummi Nation's request for an adjudication of water rights in the Nooksack Basin. Ecology is conducting a statewide assessment to determine where the next water rights adjudication should occur, taking into account several factors. Robin McPherson from Ecology will report more information at the next Watershed Management Board Meeting. Jilk said it is important to have this discussion with the Commission and legal counsel, and to find out what other cities' expectations are. At this point, the District has not been asked to respond.

8. Commissioners Report

Deshmane reported that he was asked to introduce former Cleveland Mayor/Presidential Candidate Dennis Kucinich at a community event last week at the Bellingham Unitarian Church. The topic was public power. Deshmane said he personally knows Kucinich and admires Kucinich's "political courage" who went against big banks as the Mayor of Cleveland to save Cleveland municipal power plant from private ownership, and that we should look at public power as a good idea.

Jilk suggested that the March 17 Special Meeting may be a good time to hold discussion in public session. A meeting with the City of Bellingham (Natural Resources) to discuss methods of how the City and PUD should gather input and approach the community for these public power "public" discussions was proposed. The Bellingham Climate Action Committee has some solid recommendations, in which the city has aligned. If the PUD Commission wants to take a role, perhaps community meetings in countywide settings to discuss the benefits of public power to the community and aligning with the climate action goals. This type of involvement is much more subtle and indirect than "taking over" Puget Sound Energy.

Murphy is concerned with the costs involved of purchasing PSE's electric infrastructure, etc., and ultimately these costs would be passed to the public, so it might not be as cost effective as people think. He also questioned where future power would come from. Would the power source be BPA or would the PUD need to act as a broker and buy its power on the open market?

9. Additional Public Comment

Rick Maricle commented on the new agenda format and the history of the Whatcom PUD, which was formed to take over Puget Sound Power and Light in the 1930s. At that time, an analysis on the cost to purchase PSP & L infrastructure determined that the savings would be debt service, and there was no cost of return until after 30 years. After World War II ended, no one was up for the legal fight that surely would follow.

DRAFT

Robin Dexter also attended the Kucinich event and said that the representative from the Bellingham Climate Action Plan spoke about various ways to provide public power that is cheaper than investor-owned utilities. What is urgent, Dexter believes, is that PSE is not keeping up with climate change issues, and as weather/climate emergencies happen more frequently, we will become more constrained on our resources. Even the City of Bellingham is beginning to take action by phasing in all-electric fleet vehicles. The time is now. Dexter also commented on the Lummi Nation adjudication request. Dexter has spent 20 years in water policy. He feels that the Commission should join with the Lummi's request for adjudication, reasons including that the water rights database is unknown, a lot of money and staff time has been wasted over the years, and currently, the Planning Unit is at a standstill.

Todd Lagestee commented that what is missing amongst the discussions of public power and climate change is that citizens are subject to the monopoly of Puget Sound Energy. In response to Maricle's comment, many tasks are accomplished on a 30-year timeline; Lagestee recalled the time when PSE subcontracted its line work away from internal staff to Potelco, and it is still the case. Keep the subject about removing privatization.

10. Executive Session

Commission Vice President Mike Murphy requested an Executive Session pursuant to RCW 42.30.110(1) (i) to discuss potential litigation.

The estimated time for the Executive Session was fifteen (15) minutes. The Commission Vice President indicated that action was anticipated to occur after the adjournment of the Executive Session. After a five-minute recess, Commissioner Murphy adjourned the Commission into Executive Session at 9:08 a.m.

) The Commission was in Executive Session for 23 minutes.

Executive Session Adjourn

There being no further business for the Executive Session, the Commission reconvened to the regular meeting at 9:31 a.m.

11. Construction Damage Settlement

Legal Counsel Sitkin discussed recent litigation regarding an insurance claim, after a contractor had severely damaged a District waterline: On August 27, 2018, a large water leak occurred on the Douglas Road main line just west of Lake Terrell Road. Full Bore, Inc., a sub-contractor for Valkyrie Telecom Inc. (VTI) working on the extension of a fiber line for the District was digging at an angle, striving to reach under the pipeline to continue the line. At approximately 2 p.m., the pipeline was struck and punctured. The Water Crew responded quickly and worked in coordination with Phillips 66 Refinery to stop the leak without causing a refinery shutdown and consequential financial hardship on the refinery. The water pressure was lowered and a temporary fix using P and P Excavators, was put into place. The excess water was diverted through drainage ditches and permanent repair work was completed in about a week.

The parties mediated on February 7, 2020 and have agreed to resolve all claims between them. The settlement is contingent upon approval by the Board of Commissioners. Staff and Legal Counsel are recommending that the terms be approved:

The carrier for Full Bore will pay \$343,000 to the PUD; the carrier for Valkyrie Telecom will pay \$5,000 to the PUD. The total settlement amount to be received by the PUD is \$348,000. The payment is to be made within 30 days of the PUD's signature on final settlement amounts.

ACTION: Commissioner Murphy motioned to APPROVE THE CONTINGENT CR2A SETTLEMENT UPON FINAL LEGAL REVIEW AND AUTHORIZE THE GENERAL MANAGER TO SIGN AND EXECUTE THE DOCUMENTS. Commissioner Deshmane second the motion. Motion passed unanimously.

DRAFT

12. Adjourn

There being no further business for the regular meeting, the Commission adjourned the regular meeting at 9:36 a.m.

Jeffrey McClure, President

Michael Murphy, Vice President

Atul Deshmane, Secretary

Memo

To: Commissioners Deshmane, McClure, and Murphy
From: Stephan Jilk, General Manager
Date: February 25, 2020
Re: Revised Expense/Per Diem Reimbursement Form

Requested Action: NO ACTION NECESSARY, FOR INFORMATION ONLY.

Background: During our recent audit by the State Auditor's office, the following was noted in their Exit Recommendations:

Commissioner Compensation

In addition to salary, District Commissioners receive per diem compensation for each day or portion of a day spent in attendance at official meetings, meetings held or work done for District business. The District does not have policies in place regarding commissioner compensation especially one that would outline permissible business purposes for meetings commissioners attend outside of board meetings. In addition, a detailed business purpose is not consistently included in commissioner compensation documentation.

We recommend the District adopt formal policies regarding commissioner compensation, ensuring a universal understanding of permissible business purposes for meetings. We also recommend clear documentation of the business purpose for each meeting.

Resolution 768, establishing the *Policy of Governance and Management*, passed January 28, 2020 addresses the need for a policy for commissioner compensation. The attached, revised expense reimbursement form now includes a section for Business Purpose to be included with the reimbursement request.

Fiscal Impact: No Fiscal Impact.

Recommended Action: NO ACTION NECESSARY, FOR INFORMATION ONLY.

Public Utility District No.1 of Whatcom County
2020 Commissioner Reimbursement Expense Report

NAME _____

DATE FROM _____ TO _____

ATTACH RECEIPTS

DATE	MEETING/WORKSHOP/ CONFERENCE (DESCRIBE)	LOCATION (DESCRIBE)	BUSINESS PURPOSE (DESCRIBE)	EXPENSE (COST)	MILEAGE		ODOMETER		PER DIEM (# Days)	TOTAL
					RATE	0.575	RATE	\$128		
										-
										-
										-
										-
										-
										-
										-
										-
										-
TOTAL				-		0.00	-			-

NOTES/MEMORANDUM _____

DO NOT WRITE BELOW THIS LINE - ACCOUNTING ONLY

EMPLOYEE CERTIFICATION
 I hereby certify, under penalty of perjury, that this is a true and correct claim for necessary expenses incurred by me, and that no payment has been received by me on this claim.

NAME: _____ **TITLE:** _____

APPROVED BY: _____ **TITLE: GENERAL MANAGER**

NAME: _____

_____...\$
 _____...\$
 _____...\$
 _____...\$

CODED	ENTERED
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Memo

To: Commissioners Deshmane, McClure and Murphy
From: Duane Holden – Director of Utility Operations
Date: February 25, 2020
Re: Approve Rebuild of Water Plant No. 1 High Head Pump No. 4 (CIP RW-M-10)

Requested Action: APPROVE GRUNDFOS CBS, INC. TO REBUILD WATER PLANT NO. 1 HIGH HEAD PUMP NO. 4 ASSEMBLY (CIP RW-M-10) AND AUTHORIZE THE DISTRICT'S GENERAL MANAGER TO PROCEED WITH THE PURCHASE OF THE REBUILD FOR THE PRICE OF \$150,919.00, NOT INCLUDING SALES TAX.

Background: As part of the 2020 CIP budget, staff included the rebuild of a high head motor and pump for the Water Plant No. 1 facility. High head pump No. 4 failed and is in need of a rebuild. Water Operations staff uses this pump and motor combination paired with the existing VFD from Plant 1. Rebuilding this pump will restore the pumping flexibility, reliability, and capacity.

The cost estimate for the pump includes parts and labor. The equipment to be rebuilt is covered by a previous Sole Source Resolution (No. 637) approved by the Commission.

If approved, the rebuild of the pump assembly will be complete and ready to install this coming fall.

Fiscal Impact: Purchase of the pump rebuild will have no impact on the District's 2020 budget. The project is included as (CIP RW-M-10) and the cost estimate is less than the budget amount.

Recommended Action: APPROVE GRUNDFOS CBS, INC. TO REBUILD WATER PLANT NO. 1 HIGH HEAD PUMP NO. 4 ASSEMBLY (CIP RW-M-10) AND AUTHORIZE THE DISTRICT'S GENERAL MANAGER TO PROCEED WITH THE PURCHASE OF THE REBUILD FOR THE PRICE OF \$150,919.00, NOT INCLUDING SALES TAX.

PUBLIC UTILITY DISTRICT No.1

of Whatcom County

1705 Trigg Road • Ferndale, WA 98248

P: (360) 384-4288 • F: (360) 384-4849

Memo

AGENDA ITEM # 6b
February 25, 2020

To: Commissioners Deshmane, McClure and Murphy

From: Stephan Jilk, General Manager

Date: February 25, 2020

Re: Approve Professional Consulting Services Agreement with Performance Information Technologies for SCADA Support Services

Requested Action – Approve a Professional Consulting Services Agreement with Performance Information Technologies for SCADA Support Services, and authorize the General Manager to execute the Agreement.

Background – Whatcom PUD previously executed a Professional Consulting Services Agreement (“PSA”) with Performance Information Technologies (“Performance IT”) on November 10, 2015. The PSA expired on its own terms December 31, 2018.

Whatcom PUD staff continues to need technical services support on an ongoing basis for the development and deployment of the utility-wide SCADA system. Staff desires to again contract with Performance IT to continue this work and provide needed technical services to support further development and deployment of Whatcom PUD’s utility SCADA system.

Major work tasks will include, but not be limited to:

-) Assessment of the current state of the Whatcom PUD’s SCADA software, including but not limited to: compliance with best practices, efficient configuration of software components and system architecture, and implementation of virtualization technologies.
-) Assistance in creating a roadmap for future implementations, expansions, and upgrades to avoid common pitfalls associated with the use of the software and to get maximum value out of the software.
-) Assistance in troubleshooting on-going issues as requested by Whatcom PUD.
-) Other work tasks as needed from time to time, as requested by Whatcom PUD.

Specific SCADA related tasks for Performance IT will be identified from time to time by Whatcom PUD. From this a Scope of Work will be developed by consultation of the parties. The Scope of Work and an associated cost not to exceed budget amount for the Work will be negotiated between the parties and identified in a Work Order. All Work Orders to be executed under the Agreement must be approved in writing and approved, in advance of the work to be performed, by the Commission and/or General Manager of Whatcom PUD.

If approved, the term of the new PSA would extend through December 31, 2022.

Fiscal Impact –Whatcom PUD’s current 2020 Annual Budget includes sufficient funds to cover work to be performed by Performance IT under the Agreement during this calendar year.

Recommended Action – Approve a Professional Consulting Services Agreement with Performance Information Technologies for SCADA Support Services, and authorize the General Manager to execute the Agreement.

**STANDARD AGREEMENT
FOR PROFESSIONAL CONSULTING SERVICES**

THIS AGREEMENT (“Agreement”) is made and entered into this ____ day of _____ 2020, by and between the **PUBLIC UTILITY DISTRICT NO. 1 of WHATCOM COUNTY**, 1705 Trigg Road Ferndale, WA 98248, hereinafter called the "Whatcom PUD," **and Performance Information Technologies** having an address of 16541 Redmond Way #C163, Redmond, WA 98053; hereinafter called "Consultant," for a project generally described as:

Technical Services to Support Development and Deployment of Whatcom PUD’s Utility SCADA System.

WHEREAS, the selection of the consultants, and the Consultant herein, were made after the completion of a process that complied with all provisions of Federal, State, and local laws concerning selection of professional services.

NOW, THEREFORE, for and in consideration of the promises and the mutual covenants set forth herein, the parties agree as follows:

1. **Scope of Services.** The specific assignments for the Consultant will be identified from time to time by Whatcom PUD. The Consultant will prepare and submit to Whatcom PUD a proposed Work Order which shall include the proposed scope of services and fee estimate for the proposed assignment. If acceptable, Whatcom PUD will execute the Work Order for the specific assignment. The scope of Work Orders is hereinafter referred to as “Work”. Services of the Consultant shall conform with the standard of care applicable to professionals providing similar such services in the State of Washington. All Work Orders must be approved in writing and approved in advance by the Commission and/or General Manager of Whatcom PUD. The terms and conditions of this Agreement shall apply in all Work Orders approved by the Whatcom PUD, unless a Work Order contains terms and conditions different than those provided herein. Any Work Order and this Agreement shall be interpreted to give full meaning to all provisions. In the event that any provision of this Agreement is in conflict with any provision of an approved Work Order, the more specific shall control, and if a conflict still exists, then the Work Order shall control the specific conflicting provision

2. **Term.** The term of this Agreement shall commence on execution of this Agreement until all tasks associated with the scope of services herein, as may be amended, have been completed by Consultant or December 31, 2022, whichever is sooner, unless terminated earlier as provided herein.

3. **Termination.** Whatcom PUD reserves the right to terminate this Agreement at any time by sending written notice of termination to the Consultant. The notice shall specify a termination date at least fourteen (14) calendar days after the date the notice is issued. The notice shall be effective upon the earlier of either actual receipt by the Consultant (whether by fax, mail, delivery or other method reasonably calculated to be received by the Consultant in a reasonably prompt manner) or three (3) calendar days after issuance of the notice. Upon the notice date, the Consultant shall immediately commence to end the Work in a reasonable and orderly manner. Unless terminated for the Consultant's material breach, the Consultant shall be paid or reimbursed for: (a) all hours worked and eligible expenses incurred up to the notice date, less all payments previously made; and (b) those hours worked and eligible expenses incurred after the notice date, but prior to the termination date, that were reasonably necessary to terminate the Work in an orderly manner. The notice shall be sent by the United States Mail to the Consultant's address provided herein, postage prepaid, certified or registered mail, return receipt requested, or by hand delivery. In addition, the notice may also be sent by any other method reasonably believed to provide the Consultant actual notice in a timely manner, such as fax. Whatcom PUD does not by this Section waive, release or forego any legal remedy for any violation, breach or non-performance of any of the provision of this Agreement. At its sole option, Whatcom PUD may deduct from the final payment due the Consultant (a) any damages, expenses or costs arising out of any such violations, breaches, or non-performance and (b) any other back charges or credits.

4. **Compensation and Payment.** Whatcom PUD shall pay the Consultant only for completed Work and for services actually rendered which are described in each Work Order. Such payment shall be full compensation for Work performed or services rendered, including, but not limited to, all labor, materials, supplies, equipment and incidentals necessary to complete the Work. The Consultant shall obtain the prior written approval of Whatcom PUD for any charges for additional services by the Consultant, the additional services of others retained by the Consultant, or the furnishing of additional supplies, materials or equipment. The Consultant shall not be entitled to compensation for any such additional charges incurred in violation of this paragraph.

4.1 The Consultant shall submit monthly statements, including project budget status and a narrative progress description of services rendered in a form and in such detail as requested by Whatcom PUD. Whatcom PUD shall make prompt monthly payments for work completed to the Whatcom PUD's satisfaction and billed before the first day of the month. Whatcom PUD shall review and consider for approval all bills submitted one week prior to a regularly scheduled meeting of Whatcom PUD Commissioners. After approval of the Consultant's statement of bill, Whatcom PUD shall forward the approval to the County Treasurer for payment in the normal course of events. In no event shall Whatcom PUD be charged interest on payments due under this Agreement. Whatcom PUD shall not be obligated to pay for services deemed unsatisfactory.

5. **Compliance With Laws.** All Federal, State and local laws applicable in the rendering of the services by the Consultant shall be complied with in all respects by the Consultant, as shall all rules and regulations of Whatcom PUD and any other governmental agency. The Consultant shall register, as required by RCW 23B.15.010, to do business in the State of Washington and provide proof of the same to Whatcom PUD.

6. **Project Management.** Whatcom PUD's designated representative may at any time issue written directions within the general scope of this Agreement. If any such direction causes an increase or decrease in the cost of this Agreement or otherwise affects any other provision of this Agreement, the Consultant shall immediately notify the designated representative in writing and take no further action concerning those written directions until such time as the parties have executed a written change order. No additional work shall be performed or charges incurred unless and until Whatcom PUD approves in writing the change order and the increased cost thereof. Any work done in violation of this paragraph shall be at the sole expense of the Consultant.

7. **Recordation of Documents Affecting Title.** Prior to the execution or recordation of any documents affecting title to any property, the said document shall be reviewed by Whatcom PUD. Whatcom PUD shall be responsible for all costs associated with such review.

8. **Conflict of Interest.** Consultant covenants that it presently has no interest and shall not acquire an interest, directly or indirectly, which would conflict in any manner or degree with its performance under this Agreement. Consultant further covenants that in the performance of this Agreement, no person having such interest shall be employed by it or any of its subcontractors.

9. **Insurance.** Consultant shall procure and maintain during the term of this Agreement the following insurance:

a. Comprehensive general liability policy covering all claims for personal injury (including death) and/or property damage arising out of Consultant's services. The limits of liability shall be not less than One Million Dollars (\$1,000,000) for each occurrence and in the aggregate unless Whatcom PUD approves in writing a lesser limit.

b. Automobile Liability Insurance covering all owned and non-owned automobiles or vehicles used by or on behalf of Consultant. The limits of liability shall be not less than One Million Dollars (\$1,000,000) for each occurrence and in the aggregate unless Whatcom PUD approves in writing a lesser limit.

c. Workers Compensation Insurance as required by law.

9.1 The foregoing insurance policies shall name Whatcom PUD as an additional insured. Consultant shall provide two (2) certificates of insurance and, if requested, copies of any policy to Whatcom PUD. Receipt of such certificate or policy by Whatcom PUD does not constitute approval by Whatcom PUD of the terms of such policy. Furthermore, the policy of insurance

required herein shall: (i) be written as a primary policy; (ii) expressly provide that such insurance may not be materially changed, amended or canceled with respect to Whatcom PUD except upon forty-five (45) days prior written notice from the insurance company to Whatcom PUD; (iii) contain an express waiver of any right of subrogation by the insurance company against Whatcom PUD and Whatcom PUD's elected officials, employees, or agents; (iv) expressly provide that the insurance proceeds of any loss will be payable notwithstanding any act or negligence of Consultant which might otherwise result in a forfeiture of said insurance; and (v) in regard to physical property damage coverage, expressly provide that all proceeds shall be paid jointly to Whatcom PUD and Consultant.

9.2 If Consultant fails to procure and maintain the insurance described above, Whatcom PUD shall have the right, but not the obligation, to procure and maintain substitute insurance and to pay the premiums. Consultant shall pay to Whatcom PUD upon demand the full amount paid by Whatcom PUD, or Whatcom PUD may offset such premiums against amounts to be paid to Consultant.

10. Indemnification. Consultant shall indemnify and hold Whatcom PUD harmless from and against all costs and losses, and all claims, demands, suits, actions, payments and judgments, arising from personal injury or otherwise, brought or recovered against Whatcom PUD by reason of any negligent act or omission of Consultant, its directors, officers, agents or employees in the performance and execution of the Services hereunder, including any and all expenses, legal or otherwise, incurred by Whatcom PUD or its representatives in the defense of any claim or suit.

11. Confidentiality. Any reports, documents, questionnaires, records, information or data given to or prepared or assembled under this Agreement which Whatcom PUD requests to be kept confidential shall not be made available by the Consultant to any individual or organization without prior written approval of Whatcom PUD, except as may be ordered by a court of competent jurisdiction. The provisions of this section shall survive the expiration or earlier termination of this Agreement. No reports, records, questionnaires, software programs provided by Whatcom PUD or other documents produced in whole or in part by the Consultant under this contract shall be the subject of an application for copyright by or on behalf of the Consultant.

12. Property of District. All Plans, Reports, Documents, Photographs, Drawings, and Specifications that are generated by the Consultant for Whatcom PUD under this contract are and shall remain the property of Whatcom PUD whether the Project for which they are made is executed or not. The Consultant assumes no liability for any use of the Drawings and Specifications other than that originally intended for this Project. The Consultant shall retain originals during the performance of the Services and reproducible copies shall be provided as requested by Whatcom PUD. Upon completion of the work, the originals of all Plans, Drawings and Specifications shall be delivered to Whatcom PUD.

13. Electronic Transmission. All electronically transmitted output must be compatible with existing District software and must be accompanied by at least one (1) copy of written reports. Consultant shall check with Whatcom PUD for software application and system compatibility.

14. **Contamination.** For the purpose of this clause, contamination conditions shall mean the actual or alleged existence, discharge, release or escape of any irritant, pollutant, contaminant, or hazardous substance into or upon the atmosphere, land, groundwater, or surface water of or near the property. Consultant will promptly notify Whatcom PUD of contamination conditions, if identified.

15. **No Employment Relation Created.** Consultant is an independent contractor, who will provide services to Whatcom PUD. The Parties are not “partners” and this Agreement does not create a partnership, joint venture relationship or an employer-employee relationship. The relationship between Whatcom PUD and the Consultant is not and shall not be construed to be an employment relationship under any circumstance, and shall be construed only to be an independent contractor relationship with Whatcom PUD.

16. **Industrial Insurance Act Defense Waiver.** The Consultant expressly waives any claim of defense against Whatcom PUD as may be provided by the Industrial Insurance Act, RCW 51.04.010 *et seq.* for any claim asserted by any person (or relative or estate thereof) for injury or death sustained during the course of the Contract work.

17. **Subconsultants.** Contractor shall notify Whatcom PUD in writing of all subconsultants hired or utilized by Consultant. At the time of project completion, the Consultant agrees to certify to Whatcom PUD that all sub-consultants have been paid in full. Consultant shall be solely responsible for the performance of any sub-consultant. All such subconsultants shall possess all licenses and insurance as required by the laws of the State of Washington.

18. **Discrimination.** In connection with the performance of this Agreement, the Consultant shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, marital status, or being handicapped, a disadvantaged person, or a disabled or Vietnam era veteran. The Consultant shall take affirmative action to ensure that the employees are treated during employment without regard to, their race, color, religion, sex, national origin, age, marital status, or being handicapped, or disadvantaged person, or disabled or Vietnam era veteran.

19. **Understanding of Agreement.** Each party acknowledges that such party has read this Agreement and understands its contents, that such party has had the opportunity to have this Agreement reviewed by an attorney of such party’s choice, and that such party either has consulted with an attorney or voluntarily has chosen not to consult with an attorney before signing this Agreement.

20. **Litigation/Arbitration.** In the event either party herein finds it necessary to bring an action against the other party to enforce any of the terms, covenants or conditions hereof or any instrument executed pursuant to this Agreement by reason of any breach or default hereunder or thereunder, the party prevailing in any such action or proceeding shall be paid all costs and attorneys’ fees incurred by the other party, and in the event any judgment is secured by such prevailing party all such costs and attorneys’ fees of collection shall be included in any such judgment. In the event of any dispute arising between the parties to this Agreement, any such

dispute shall be submitted to binding arbitration as provided herein. The parties shall select an independent and unbiased arbitrator who is not affiliated directly or indirectly with either party within ten (10) days after any party demands arbitration. If the parties fail to select or cannot agree upon an arbitrator within this time, then they shall make application to the Superior Court of Whatcom County, pursuant to RCW 7.04 et seq., for an order appointing an arbitrator. Such application may be made at any time after the ten (10) day period has expired. Upon application to the court for an arbitrator, the Court shall select an arbitrator who shall render his/her decision no later than sixty (60) days after his/her appointment. If the arbitrator requests a hearing prior to rendering his/her decision, such hearing shall be held in Whatcom County, Washington within thirty (30) days of the arbitrator's appointment. The arbitrator's decision shall be binding on both parties. Each party shall bear its own expenses associated with the arbitration but shall share equally the costs of the arbitrator. RCW Chapter 7.04 and Rules 5.2 through 5.4 of the Mandatory Arbitration Rules for Superior Court ("MAR") shall govern the arbitration. In the event of any inconsistencies between the Binding Arbitration Clause, RCW Chapter 7.04, and MAR 5.2 through 5.4, the terms of the Binding Arbitration Clause shall take precedence over RCW Chapter 7.04 and MAR 5.2 through 5.4; and RCW Chapter 7.04 shall take precedence over MAR 5.2 through 5.

21. **Notices.** All notices, demands, requests, consents and approvals which may or are required to be given by any party to any other party hereunder shall be in writing and shall be deemed to have been duly given if delivered personally, sent by facsimile, sent by a nationally recognized overnight delivery service, or if mailed or deposited in the United States mail and sent by registered or certified mail, return receipt requested, postage prepaid to:

District: Stephan Jilk, General Manager
Public Utility District No. 1 of Whatcom County
1705 Trigg Road
Ferndale, WA 98248

Consultant: Greg Dubiel
Performance Information Technologies
16541 Redmond Way #C163
Redmond, WA 98053

or to such other address as the foregoing parties hereto may from time-to-time designate in writing and deliver in a like manner. All notices shall be deemed complete upon actual receipt or refusal to accept delivery. Facsimile transmission of any signed original document and retransmission of any signed facsimile transmission shall be the same as delivery of an original document.

22. **Amendment.** No modification, termination or amendment of this Agreement may be made except by written agreement signed by all parties, except as provided herein.

23. **Waiver.** No failure by any of the foregoing parties to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or

any other covenant, agreement, term or condition. Any party hereto, by notice and only by notice as provided herein, may, but shall be under no obligation to, waive any of its rights or any conditions to its obligations hereunder, or any duty, obligation or covenant of any other party hereto. No waiver shall affect or alter this Agreement, and each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.

24. **Captions.** The captions of this Agreement are for convenience and reference only and in no way define, limit, or describe the scope or intent of this Agreement.

25. **Severability.** In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

26. **Counterparts.** This Agreement may be executed in any number of counterparts, and each such counterpart hereof shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement.

27. **Neutral Authorship.** Each of the provisions of this Agreement has been reviewed and negotiated and represents the combined work product of all parties hereto. No presumption or other rules of construction which would interpret the provisions of this Agreement in favor of or against the party preparing the same shall be applicable in connection with the construction or interpretation of any of the provisions of this Agreement.

28. **Governing Law.** This Agreement and the right of the parties hereto shall be governed by and construed in accordance with the laws of the State of Washington.

29. **Time of Performance.** Time is specifically declared to be of the essence of this Agreement and of all acts required to be done and performed by the parties hereto.

30. **Entire Agreement.** The entire agreement between the parties hereto is contained in this Agreement and the exhibits hereto, and this Agreement supersedes all of their previous understandings and agreements, written and oral, with respect to this transaction. This Agreement may be amended only by written instrument executed by the parties subsequent to the date hereof. The Consultant specifically understands that no District employees other than the project manager or his/her supervisors are authorized to direct the work of the Consultant and/or amend this Agreement.

IN WITNESS WHEREOF, the parties hereto execute this Agreement.

DISTRICT:

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY

By: _____

Title: General Manager

Date signed: _____

CONSULTANT:

By: _____

Title: _____

Firm's EIN: _____

Date signed: _____

Memo

AGENDA ITEM # 6c
February 25, 2020

To: Commissioners Deshmane, McClure and Murphy
From: Brian Walters – Assistant General Manager
Date: February 25, 2020
Re: Approve Amendment No.4 to Bender Park Communications Tower Agreement with New Cingular Wireless PCS, LLC

Requested Action: APPROVE AMENDMENT NO. 4 TO BENDER PARK COMMUNICATIONS TOWER AGREEMENT WITH NEW CINGULAR WIRELSSS PCS, LLC AND AUTHORIZE THE DISTRICT’S GENERAL MANAGER TO EXECUTE THE AMENDMENT.

Background: The District entered into the Bender Park Communications Tower Agreement (“Agreement”) with New Cingular Wireless PCS, LLC (“Tenant”, also “Cingular”) on January 27, 2004. Under the Agreement, Cingular, a subsidiary of AT&T Mobility Corporation, obtained the right to lease a portion of real property controlled by the District and to install equipment on a communications tower owned and operated by the District. In exchange, Cingular as the Tenant is obligated to comply with certain specified contractual obligations, including monthly lease payments, which escalate over the term of the Agreement.

The Agreement has been previously amended three times by the parties. The third amendment extended the term of the Agreement from January 27, 2019 through December 31, 2019. Amendment No. 4 further extends the term of the Agreement through July 31, 2020.

The District’s communications tower and associated equipment are located on property owned by the City of Ferndale (“City”). The District and City previously entered into an Interlocal Agreement and Easement, which has enabled the District to utilize the City’s property and construct & operate a communications tower on the site. The two legal documents are set to expire July 31, 2020. The District and City have been in discussions for over a year regarding revisions to the documents. Among the revisions discussed have been the extension of the term for the Interlocal and Easement up to an additional twenty years and an increase in the property area to be covered by the Easement. Also under discussion is the merging of the separate Easement document into the Interlocal document.

Renewing the District’s agreements with the City for use of the Bender Park property are essential to the continuance of the District’s Agreement with Cingular, the Tenant. Until such time as the District can

conclude negotiations and execute new agreements with the City, the District cannot commit to any longer term new or revised Agreement with Cingular.

The sole purpose of Amendment No.4 is to secure additional time for Cingular to continue utilizing the property and tower covered by the Bender Park Agreement with the expectation that the District can conclude negotiations and execute a new or revised Interlocal Agreement and Easement with the City by July 31, 2020.

District staff recommends approval of Amendment 4, which will extend the termination date of the existing Bender Park Communications Tower Agreement to July 31, 2020.

Fiscal Impact: Approval and execution of the Bender Park Communications Agreement has no financial impact on the District.

Recommended Action: APPROVE AMENDMENT NO. 4 TO BENDER PARK COMMUNICATIONS TOWER AGREEMENT WITH NEW CINGULAR WIRELSSS PCS, LLC AND AUTHORIZE THE DISTRICT'S GENERAL MANAGER TO EXECUTE THE AMENDMENT.

Cell Site No. WA-322-021
Cell Site Name: NE FERNDALE
Fixed Asset No. 10037172
Market: SEATTLE/OREGON/NO. ID
Address: 2601 Thornton Road, Ferndale, WA 98248

AMENDMENT NO. 4 TO BENDER PARK COMMUNICATIONS TOWER AGREEMENT

THIS AMENDMENT NO. 4 TO BENDER PARK COMMUNICATIONS TOWER AGREEMENT ("**Amendment**"), dated as of the latter of the signature dates below (the "**Effective Date**"), is by and between Public Utility District No. 1 of Whatcom County, a municipal corporation, having a mailing address of 1705 Trigg Road, Ferndale, WA 98248 (hereinafter referred to as "**District**"), and New Cingular Wireless PCS, LLC, a Delaware limited liability company, having a mailing address of 1025 Lenox Park Boulevard NE, 3rd Floor, Atlanta, GA 30319 (hereinafter referred to as "**Cingular**").

WHEREAS, District and Cingular (or its respective predecessor) entered into a Bender Park Communications Tower Agreement dated January 27, 2004, as amended by an Amendment No. 1 to Bender Park Communications Tower Agreement dated April 15, 2013, an Amendment No. 2 to Bender Park Communications Tower Agreement dated March 25, 2014, and an Amendment No. 3 to Bender Park Communications Tower Agreement dated January 15, 2019 (hereinafter, collectively referred to as the "**Agreement**"), whereby District leased to Cingular certain Premises, therein described, that are a portion of the Property located at 2601 Thornton Road, Ferndale, WA 98248; and

WHEREAS, District and Cingular desire to amend the Agreement to extend the term of the Agreement to July 31, 2020.

WHEREAS, pursuant to the Agreement, the Lease expired on December 31, 2019; and

NOW THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, District and Cingular agree that the recitals set forth above are incorporated herein as if set forth in their entirety and further agree as follows:

1. **Extension of Term.** District and Cingular wish to reinstate the Agreement and extend the Term of the Agreement to provide that the Agreement shall expire on July 31, 2020, unless renewed or extended by separate written agreement of the parties.

2. **Other Terms and Conditions Remain.** In the event of any inconsistencies between the Agreement and this Amendment, the terms of this Amendment shall control. Except as expressly set forth in this Amendment, the Agreement otherwise is unmodified and remains in full force and effect. Each reference in the Agreement to itself shall be deemed also to refer to this Amendment.

[SIGNATURES APPEAR ON THE NEXT PAGE]

Cell Site No. WA-322-021
Cell Site Name: NE FERNDALE
Fixed Asset No. 10037172
Market: SEATTLE/OREGON/NO. ID
Address: 2601 Thornton Road, Ferndale, WA 98248

IN WITNESS WHEREOF, the parties have caused their properly authorized representatives to execute this Amendment on the dates set forth below.

DISTRICT:

Public Utility District No. 1 of Whatcom County,
a Municipal Corporation

By: _____
Name: _____
Title: _____
Date: _____

CINGULAR:

New Cingular Wireless PCS, LLC,
a Delaware limited liability company
By: AT&T Mobility Corporation
Its: Manager

By: _____
Name: _____
Title: _____
Date: _____

[ACKNOWLEDGMENTS APPEAR ON THE NEXT PAGE]

Prepared by, and after recording

Return to:

Jon Sitkin

Chmelik Sitkin & Davis P.S.
1500 Railroad Ave.
Bellingham, WA 98225

MEMORANDUM
OF
AMENDMENT NO. 4 TO BENDER PARK COMMUNICATIONS TOWER AGREEMENT

Grantor:	Public Utility District No. 1 of Whatcom County, a municipal corporation		
Grantee:	New Cingular Wireless PCS, LLC, a Delaware limited liability company		
Legal Description:	A subdivision of the Northwest Quarter of the Northeast Quarter of Sec. 24, Township 39, Range 1 East W.M. (abbreviated legal)		
Assessor's Tax Parcel ID #:	390124-392440		
Reference Number of Prior Recorded Documents:	2040103883, 2130402624, 20190200237		
True Consideration Paid	Does not apply	Tax Mailing Address:	Does not apply
Cell Site #:	WA-322-021	Fixed Asset #:	10037172
Cell Site Name:	NE FERNDALE		
State:	Washington	County:	Whatcom

This Memorandum of Amendment No. 4 to the Bender Park Communications Tower Agreement is entered into on this ____ day of _____, 20____, by and between Public Utility District No. 1 of Whatcom County, a municipal corporation, having a mailing address of 1705 Trigg Road, Ferndale, WA 98248 (hereinafter referred to as "**District**") and New Cingular Wireless PCS, LLC, a Delaware limited liability company, having a mailing address of 1025 Lenox Park Boulevard NE, 3rd Floor, Atlanta, GA 30319 (hereinafter referred to as "**Cingular**").

1. District (or its respective predecessor-in-interest) and Cingular (or its respective predecessor-in-interest) entered into a certain Bender Park Communications Tower Agreement on the 27th day of January, 2004, as amended by that certain Amendment No. 1 to Bender Park Communications Tower Agreement dated April 15, 2013, an Amendment No. 2 to Bender Park Communications Tower Agreement

dated March 25, 2014 and an Amendment No. 3 to Bender Park Communications Tower Agreement dated January 15, 2019 (hereinafter, collectively referred to as the “**Agreement**”) for the purpose of installing, operating and maintaining a communications facility and other improvements at District’s real property located at 2601 Thornton Road, Ferndale, WA 98248. All of the foregoing is set forth in the Agreement.

2. Pursuant to Amendment No. 4, the extended term of the Agreement will expire on July 31, 2020.
3. The portion of the land being leased to Cingular (the “**Premises**”) is described in **Exhibit 1** annexed hereto.
4. This Memorandum of Amendment No. 4 to Bender Park Communications Tower Agreement is not intended to amend or modify, and shall not be deemed or construed as amending or modifying, any of the terms, conditions or provisions of the Agreement, all of which are hereby ratified and affirmed. In the event of a conflict between the provisions of this Memorandum of Amendment No. 4 and the provisions of the Agreement, the provisions of this Memorandum shall control. The Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, successors, and assigns, subject to the provisions of the Agreement.

IN WITNESS WHEREOF, the parties have executed this Memorandum of Amendment No. 4 to Bender Park Communications Tower Agreement as of the day and year first above written.

DISTRICT:

Public Utility District No. 1 of Whatcom
County,
a municipal corporation

By: _____

Name: _____

Title: _____

Date: _____

CINGULAR:

New Cingular Wireless PCS, LLC,
a Delaware limited liability company
By: AT&T Mobility Corporation
Its: Manager

By: _____

Name: _____

Title: _____

Date: _____

[ACKNOWLEDGMENTS APPEAR ON THE NEXT PAGE]

EXHIBIT 1

DESCRIPTION OF PREMISES

Page 1 of 2

to the Memorandum of Amendment No. 4 to Bender Park Communications Tower Agreement dated _____, 20__, by and between Public Utility District No. 1 of Whatcom County, a municipal corporation, as District, and New Cingular Wireless PCS, LLC, a Delaware limited liability company, as Cingular.

The Premises are a portion of the Property located at 2601 Thornton Road, Ferndale, WA 98248, and legally described and/or depicted as follows:

The Parent Parcel is described as follows:

A SUBDIVISION OF THE Northwest quarter of the Northeast quarter of Section 24, Township 39 North, Range 1 East of W.M., described as follows:

Commencing at the Northeast corner of said Section 24, thence South 89°39'11" West along the North line of said Section a distance of 1,325.07 feet to the Northeast corner of this subdivision; thence South 00°02'37" West along the East line of said subdivision a distance of 20.00 feet to the True Point of Beginning on the South line of Thornton Road (County Road NO. 239); thence continue South 00°02'37" West along said East line a distance of 1,288.51 feet to the South east corner of said subdivision; thence South 89°50'10" West along the South line of said subdivision a distance of 331.48 feet to the Southwest corner of the East half of the Southeast quarter of said subdivision; thence North 00°03'10" East along the West line of the East half of the Southeast quarter of said subdivision a distance of 753.72 feet; thence North 89°44'41" East parallel with the North line of the Southeast quarter of said subdivision a distance of 301.36 feet; thence North 00°02'37" East, parallel with the East line of said subdivision a distance of 534.20 feet to the South line of said County Road thence North 89°39'11" East along the South line of said County Road a distance of 30.00 feet to the True Point of Beginning.

Situate in Whatcom County, Washington.

EXHIBIT 1

DESCRIPTION OF PREMISES

Page 2 of 2

to the Memorandum of Amendment No. 4 to Bender Park Communications Tower Agreement dated _____, 20__, by and between Public Utility District No. 1 of Whatcom County, a municipal corporation, as District, and New Cingular Wireless PCS, LLC, a Delaware limited liability company, as Cingular.

The Premises are described as follows:

TOWER SPACE:

A 25.00 foot square parcel being a portion of the East 350 feet of the Northwest quarter of the Northeast quarter of Section 24, Township 39 North, Range .1 East W.M. as recorded and described under Whatcom County Auditor's File No. 1232550, more generally described as follows:

Commencing at the Northeast corner of said parcel as described in Exhibit A above, generally follow the improved 30 foot wide access or roadway to an area south of the future reservoir site and then westerly along an improved and/or unimproved pathway to a point near the Southwest corner of the existing reservoir; from this point the radio repeater station boundary shall be offset at a distance 20.00 feet from and parallel to the most Westerly property line and South fence line of the existing reservoir site.