

**PUBLIC UTILITY DISTRICT No. 1
of Whatcom County**

Agenda for the Regular Meeting of February 24, 2026

8:15 a.m. at the PUD Office

(In-Person, Zoom, & Teleconference)

1. Call to Order | Pledge of Allegiance
2. Approval of Agenda (2 minutes)
3. Consent Agenda (5 minutes)
 - a) Approval of the Minutes of the Meeting of February 10, 2026, Special Meeting of February 13, 2026, and Special Joint Meeting of February 17, 2026
 - b) Approval of Claims for February 24, 2026
4. Public Comment (10 minutes – Individual speakers: 3 minutes)
5. General Manager Report (20 minutes)
6. Operations Report (10 minutes)
7. Old Business (25 minutes)
 - a) Broadband Update: Action 1: Authorize the General Manager to Sign the updated IRU Agreement Between Whidbey Telephone Company D/B/A Whidbey Telecom and Whatcom PUD
 - b) Adjudication Update
 - c) Geothermal Update
 - d) GM Recruitment Update
 - e) New Customer Update
8. New Business (20 minutes)
 - a) Action 2: Authorize the General Manager to Sign an Engagement Letter with Pacifica Law Group to Serve as The PUD's Bond Counsel
 - b) Action 3: Approve Standard Professional Consulting Services Agreement with Trace3 (Cyber Security Related Services)
 - c) Resolution 1: Resolution No. 894 Authorizing the Cancellation of Warrants No. 01269670 & No. 01271405 And Reissuance of Warrant No. 01271405 to HDR Engineering Inc.
9. Commissioner Reports (10 minutes)
 - a) Upcoming Per Diem Requests
Commissioner Arnett: None as of publication
Commissioner Ury: None as of publication
Commissioner Deshmane: None as of publication
10. Public Comment (10 minutes– Individual speakers: 3 minutes)
11. Executive Session – None as of publication
12. Adjourn (10:07 a.m.)

Notice:

All Commissioners will participate either In-Person, via Zoom/internet or teleconference.

The public meeting can be accessed;

By internet: <https://us02web.zoom.us/j/82158262806>

NOTE: IF ATTENDING VIA ZOOM WE WOULD APPRECIATE YOUR FULL NAME FOR THE COMMISSION RECORD THOUGH IT IS NOT REQUIRED

Or telephone: Dial 1 (253) 215 8782 or 1 (253) 205 0468
Webinar ID: 821 5826 2806

Next Commission Meetings

March 10, 2026 |8:15 a.m.| Regular Meeting

March 24, 2026 |8:15 a.m.| Regular Meeting

Meetings to be held at the District Office

1705 Trigg Road, Ferndale, WA 98248

or other location announced

Contact: Chris Heimgartner, General Manager (360) 384-4288 x 119

info@pudwhatcom.org

www.pudwhatcom.org

02.10.2026 Commission Meeting Zoom Attendance Log

Name (original name)	Join time	Leave time	Duration (minutes)	Guest	Recording disclaimer response	In waiting room
Mike M. Whatcom PUD - IT	2/10/2026 8:07	2/10/2026 11:02	175	No	OK	No
Joseph Shay	2/10/2026 8:07	2/10/2026 11:02	175	No	No Response	No
Whatcom PUD	2/10/2026 8:07	2/10/2026 8:07	1	No	No Response	No
Rebecca Schlotterback	2/10/2026 8:07	2/10/2026 10:37	150	No	No Response	No
Whatcom PUD	2/10/2026 8:07	2/10/2026 11:02	175	No	No Response	No
stephanieh	2/10/2026 8:08	2/10/2026 11:02	174	Yes	No Response	No
Kurt Wank	2/10/2026 8:09	2/10/2026 11:01	173	Yes	No Response	No
garrettl	2/10/2026 8:11	2/10/2026 8:49	39	Yes	No Response	No
John Gevaert	2/10/2026 8:11	2/10/2026 9:11	61	Yes	No Response	No
Annette Smith	2/10/2026 8:12	2/10/2026 11:01	170	No	No Response	No
Aaron Peterson	2/10/2026 8:13	2/10/2026 11:01	168	No	OK	No
Brian Heinrich, PSE	2/10/2026 8:14	2/10/2026 10:18	124	Yes	No Response	No
Michael	2/10/2026 8:15	2/10/2026 11:02	167	Yes	No Response	No
Tyler McDevitt	2/10/2026 8:18	2/10/2026 10:17	120	Yes	No Response	No
Devin Crabtree	2/10/2026 8:32	2/10/2026 9:45	73	No	No Response	No
John Gevaert	2/10/2026 9:17	2/10/2026 9:49	33	Yes	No Response	No
John Gevaert	2/10/2026 9:17	2/10/2026 9:17	1	Yes	No Response	No
Jon Littlefield	2/10/2026 9:48	2/10/2026 9:55	7	Yes	No Response	No

**MINUTES OF THE
MEETING OF THE COMMISSION
February 10, 2026**

1. Call to Order | Pledge of Allegiance

The meeting of the Board of Commissioners of Public Utility District No. 1 of Whatcom County was called to order at 8:15 a.m. by Commissioner Eddy Ury. Said meeting was open to the public and notice thereof had been given as required by law.

Those present at the meeting included:

COMMISSION AND STAFF

Atul Deshmane	Commissioner
Jaime Arnett	Commissioner
Eddy Ury	Commissioner
Peter Ruffatto	General Counsel, CSD Attorneys at Law
Chris Heimgartner	General Manager
Aaron Peterson	IT/SCADA Tech
Andrew Entrikin	Director – Broadband and New Power Supply
Annette Smith	Finance Director
Devin Crabtree	Chief Water Operator
Garrett Love-Smith	Engineering Manager
Joseph Shay	Clerk of the Board / Records
Kurt Wank	Assistant General Manager
Lisa Moeller	Director – HR & Communications
Mike Macomber	IT/SCADA Technician
Rebecca Schlotterback	Contracts and Regulatory Compliance Manager
Stephanie Hooper	Accountant 1

VISITORS

Tyler McDevitt	Phillips 66
Brian Heinrich	Puget Sound Energy
John Gevaert	Whidbey Telecom

2. Approval of Agenda

ACTION:

Commissioner Deshmane made a motion to approve the agenda. Commissioner Arnett seconded the motion. The motion passed unanimously.

3. Approval of Consent Agenda

a) Approval of the Minutes of the Regular Commission Meeting of January 27, 2026 and Approval of the Claims of February 10, 2026:

Commissioner Arnett made a motion to approve the agenda. Commissioner Deshmane seconded the motion. The motion passed unanimously.

Claims of February 10, 2026:

AT&T MOBILITY	1,878.58
BHAM WHATCOM CHAMBER OF COMM & INDUSTRY	356.00
BIRCH EQUIPMENT COMPANY	1,016.97
BRIM TRACTOR COMPANY	1,055.11
CDW/COMPUTER DISCOUNT WAREHOUSE	735.90
CESCO NEW CONCEPT CHEMICAL PRODUCTS	117.39
CNA SURETY	399.26
COBB, FENDLEY & ASSOCIATES, INC	1,775.88
CORNERSTONE MANAGEMENT, INC.	972.00
CULLIGAN NORTHWEST	55.81
EXACT SCIENTIFIC SERVICES INC.	31.00

FERNDALE ACE HARDWARE	54.49
GRAINGER	828.72
GUARDIAN SECURITY SYSTEMS, INC	3,408.47
HARDWARE SALES, INC .	117.71
HEALTH PROMOTIONS NORTHWEST	150.00
HERITAGE ENGINEERING GROUP	65,376.87
HOOPER, STEPHANIE	36.98
NEL/SON DISTRIBUTING DBA NELSON-REISNER	935.87
NOOKSACK SALMON ENHANCEMENT ASSOCIATION	20,000.00
NORTH COAST ELECTRIC COMPANY	472.95
NORTHWEST FIBER DBA ZIPLY FIBER	883.50
PLATT ELECTRIC SUPPLY CO	8,660.86
PRINCIPAL LIFE INSURANCE COMPANY	746.63
PUD #1 OF WHATCOM COUNTY	12,119.90
PUGET SOUND ENERGY, INC	1,458.81
REGENCE BLUE SHIELD	54,506.39
RICOH USA	93.42
RICOH USA FINANCIAL SVC	128.23
SSC - SANITARY SERVICE COMPANY	695.16
STERICYCLE ENVIRONMENTAL SOLUTIONS	245.54
TEAMSTER LOCAL #231	744.00
TYLER TECHNOLOGIES-INCODE	18,013.44
ULINE, INC.	1,261.45
UNITED WAY OF WHATCOM COUNTY	400.00
UTILITIES UNDERGROUND LOCATION	18.90
WASHINGTON DENTAL SERVICE	3,218.70
WASHINGTON TEAMSTERS WELFARE	14,630.00
WHATCOM JANITORIAL	1,575.00
WHISTLE WORKWEAR	308.32
GRAND TOTAL	\$ 219,484.21

4. Public Comment – None

5. General Manager’s Report – Chris Heimgartner, General Manager reported on his attendance at the recent PPC meeting. He talked about several topics covered at the meeting noting that one of the major topics was transmission. Mr. Heimgartner informed the commission that the Department of Ecology would be hosting four meetings on geothermal with one of them being in Bellingham on February 19, 2026 which Mr. Heimgartner plans to attend. Mr. Heimgartner stated that he plans to attend a meeting with Phillips 66 on February 17, 2026 that until this year he has not been able to attend due to scheduling conflicts with the PUD commission meetings. Mr. Heimgartner gave an update on the Ferndale/Grandview consolidation efforts. Lastly, Mr. Heimgartner introduced Lisa Moeller, Director of HR and Communications who reported on the progress made on updating the PUD’s website.

6. Operations Report – Kurt Wank, Assistant General Manager noted that operations is in the middle of capital project season with projects going out to bid and planning efforts underway. Mr. Wank also informed the commission that the PUD has hired a new water operator and their start date is March 2, 2026.

7. Old Business

a) Broadband Update – Andrew Entrikin, Director of Broadband and New Power Supply reported on the ongoing Point Roberts project. Mr. Entrikin then presented Action Item 1: Authorizing the General Manager to Sign an IRU Agreement Between Whidbey Telephone Company D/B/A Whidbey Telecom and Whatcom PUD. A lengthy discussion was had between commissioners and staff with the commission raising various concerns about the IRU that they wanted addressed before they would grant permission for the General Manager to sign the IRU. Commissioner Deshmane made a motion to table Action Item 1 and call a special meeting on Friday February 13, 2026 at 3:00 PM to further discuss and take action on Action Item 1. Commissioner Arnett seconded the motion. The motion passed unanimously.

b) Adjudication Update – Peter Ruffatto, Legal Counsel reported that the courts will be ruling on a motion presented by Whatcom County to extend the filing deadline based on publication notice. The court’s decision will be made around March 16, 2026.

c) Geothermal Update – Andrew EntriKin, Director of Broadband and New Power Supply informed the commission that on February 17, 2026 the PUD and the Nooksack Tribe would be meeting to sign the MOU regarding the geothermal project.

d) GM Recruitment Update – Chris Heimgartner, General Manager reported that as of his last conversation with Lanie at Mycoff Fry Partners LLC there are 11 candidates being vetted for consideration.

e) New Customer Update – None

8. New Business - None

9. Commission Reports/Per Diem Requests:

Commissioner Arnett: No non-pre-approved per diem requests, Commissioner Arnett noted she will be attending the upcoming WPUDA events online.

Commissioner Deshmane: No non-pre-approved per diem requests, Commissioner Deshmane reported on the recent theft and return of his PUD issued iPad. He also discussed his planned attendance at the upcoming WPUDA meetings.

Commissioner Ury: No non-pre-approved per diem requests. Commissioner Ury reported on his planned attendance to the upcoming WPUDA meetings. Commissioner Ury opened the floor for discussion regarding upcoming legislative issues facing the PUD. The commissioners discussed those issues. Commissioner Ury reported that he had quit his job to focus on his role as PUD Commissioner full time.

10. Public Comment – None

11. Executive Session

None

12. Adjourn

There being no further business Commissioner Ury adjourned the meeting at 10:35 a.m.

Eddy Ury, President/Commissioner

Atul Deshmane, Vice President/Commissioner

Jaime Arnett, Secretary/Commissioner

Commission Clerk Note:

Video recordings of the Whatcom PUD Commission Meetings are available online at the following link on the PUD’s Website: <https://www.pudwhatcom.org/the-commission/agenda-packets-meeting-minutes-recordings/>

02.13.2026 Special Commission Meeting Zoom Attendance Log

Name (original name)	Join time	Leave time	Duration (minu	Guest	Recording	In waiting room
Mike M. Whatcom PUD - IT	2/13/2026 14:46	2/13/2026 16:21	96	No	OK	No
Michael M.	2/13/2026 14:48	2/13/2026 15:19	31	Yes	No Respor	No
Jaime Arnett	2/13/2026 14:51	2/13/2026 16:21	90	Yes	No Respor	No
Chris Heimgartner	2/13/2026 14:52	2/13/2026 16:21	89	Yes	No Respor	No
Todd Lagestee	2/13/2026 14:54	2/13/2026 16:21	88	Yes	No Respor	No
Atul Deshmane	2/13/2026 14:55	2/13/2026 16:21	87	No	No Respor	No
Andrew Entrikin	2/13/2026 14:55	2/13/2026 16:21	86	No	No Respor	No
Joseph Shay	2/13/2026 14:55	2/13/2026 16:21	86	No	No Respor	No
CSD - Peter Ruffatto	2/13/2026 14:56	2/13/2026 16:21	86	Yes	No Respor	No
Annette Smith - Whatcom	2/13/2026 14:56	2/13/2026 15:59	63	No	No Respor	No
Eddy Ury	2/13/2026 14:57	2/13/2026 16:21	84	No	No Respor	No

**MINUTES OF THE SPECIAL
MEETING OF THE COMMISSION
February 13, 2026**

1. Call to Order

The special meeting of the Board of Commissioners of Public Utility District No. 1 of Whatcom County was called to order at 3:02 p.m. by Commissioner Eddy Ury. Said meeting was open to the public and notice thereof had been given as required by law.

Those present at the meeting included:

COMMISSION AND STAFF

Atul Deshmane	Commissioner
Jaime Arnett	Commissioner
Eddy Ury	Commissioner
Peter Ruffatto	General Counsel, CSD Attorneys at Law
Chris Heimgartner	General Manager
Andrew Entrikin	Director – Broadband and New Power Supply
Annette Smith	Finance Director
Joseph Shay	Clerk of the Board / Records
Mike Macomber	IT/SCADA Technician

VISITORS

Todd Lagestee	Citizen
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2. Agenda

The purpose of the special meeting was to resume discussion of and take possible action on Action Item 1: Authorizing the General Manager to Sign an IRU Agreement Between Whidbey Telephone Company D/B/A Whidbey Telecom and Whatcom PUD that was tabled at the February 10, 2026 Regular Commission Meeting.

Commission President Eddy Ury opened the floor for discussion to begin. Chris Heimgartner, General Manager presented background and history of the action item to the commission.

Commissioner Ury recognized Todd Lagestee for public comment and Mr. Lagestee was on the PUD Commission during the initial conversations regarding Whidbey Telecom. Mr. Lagestee shared his concerns about the IRU.

Commissioner Arnett made a motion to authorize the General Manager to sign an IRU Agreement Between Whidbey Telephone Company D/B/A Whidbey Telecom and Whatcom PUD. Commissioner Deshmane seconded the motion. Extensive discussion occurred regarding possible amendments to the IRU. President Ury called to question the open motion. The Commissioners unanimously voted against the open motion.

Commissioner Deshmane then made a motion for staff to take the following proposed amended language to Whidbey Telecom for inclusion in Section 12.1 of the IRU stating, “... Further, Whidbey Telecom shall ensure that Approved ISPs may use network services and facilities at rates, terms, and conditions that are not discriminatory or preferential between providers.” and have the General Manager negotiate with Whidbey Telecom to secure its inclusion in the IRU. Commissioner Arnett seconded the motion. The motion passed unanimously.

Commissioner Deshmane then made a motion for staff to take the following proposed amended language to Whidbey Telecom for inclusion in Section 12.0 of the IRU stating, “Further, Whidbey shall provide a \$5.00 per served BSL, per month to PUD.” and have the General Manager negotiate with Whidbey Telecom to secure its inclusion in the IRU. Commissioner Ury seconded the motion. Commissioner Arnett voted against the motion. Commissioner Deshmane voted for the motion. Commissioner Ury abstained from voting. The motion failed.

3. Adjourn

There being no further business Commissioner Ury adjourned the meeting at 4:21 p.m.

Eddy Ury, President/Commissioner

Atul Deshmane, Vice President/Commissioner

Jaime Arnett, Secretary/Commissioner

Commission Clerk Note:

Video recordings of the Whatcom PUD Commission Meetings are available online at the following link on the PUD's Website: <https://www.pudwhatcom.org/the-commission/agenda-packets-meeting-minutes-recordings/>

**MINUTES OF THE SPECIAL JOINT
MEETING BETWEEN THE BOARD OF COMMISSIONERS OF
PUBLIC UTILITY DISTRICT NO.1 OF WHATCOM COUNTY
AND THE NOOKSACK TRIBAL COUNCIL
February 17, 2026**

1. Call to Order

The special joint meeting of the Board of Commissioners of Public Utility District No. 1 of Whatcom County and the Nooksack Tribal Council was called to order. Said meeting was open to the public and notice thereof had been given as required by law.

Those present at the meeting included:

Atul Deshmane	Whatcom PUD Commissioner
Eddy Ury	Whatcom PUD Commissioner
Chris Heimgartner	Whatcom PUD General Manager
Andrew Entrikin	Whatcom PUD Director – Broadband and New Power Supply
Lisa Moeller	Whatcom PUD Director – HR and Communications
Anna Brewer	Nooksack Tribal Council Vice-Chairwoman
Frank Leyva	Nooksack Tribal Council Secretary
Roman Swanaset-Simmonds	Nooksack Tribal Council Council Member
Victoria Joe	Nooksack Tribal Council Council Member
Ryawn Cline	Nooksack Tribal Council Council Member
Jesse Madera	Nooksack Tribal Council Council Member

NOTE: Those not present at the meeting but who were vital to the creation of the Memorandum of Understanding and should be recognized are Whatcom PUD Commissioner Jaime Arnett, Nooksack Tribal Council Chairwoman RoseMary LaClair, and Nooksack Tribal Council Treasurer Gary E. Kentner.

2. Agenda

The purpose of the special joint meeting was to sign a Memorandum of Understanding Between the Nooksack Indian Tribe and The Public Utilities District No. 1 Of Whatcom County for The Feasibility Assessment of The Mount Baker Geothermal Power Resource. The Memorandum of Understanding was signed by the PUD Commissioners and Anna Brewer, Vice-Chairwoman of the Nooksack Indian Tribal Council.

3. Adjourn

There being no further business the joint meeting was adjourned.

Eddy Ury, President/Commissioner

Atul Deshmane, Vice President/Commissioner

MEMORANDUM OF UNDERSTANDING

between the

NOOKSACK INDIAN TRIBE

and the

**PUBLIC UTILITIES DISTRICT No. 1 OF
WHATCOM COUNTY**

for the

**FEASIBILITY ASSESSMENT OF THE MOUNT
BAKER GEOTHERMAL POWER RESOURCE**

This MEMORANDUM OF UNDERSTANDING (“MOU”) is hereby made and entered into by and between the Nooksack Indian Tribe, hereinafter referred to as the "Tribe," and the Whatcom Public Utilities District #1, hereinafter referred to as the "PUD".

1. PARTIES

The Nooksack Indian Tribe is a federally recognized sovereign Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. § 476, and is a signatory to the Treaty of Point Elliott of 1855. The Tribe's usual and accustomed fishing grounds and stations encompass the entire Nooksack River basin, all its tributaries and surrounding marine water. The traditional territory includes areas within and beyond the Nooksack Watershed including areas around Mount Baker and within the Fraser River and Skagit River basins.

The Whatcom Public Utilities District #1 is a community-owned and governed utility that has the authority in Whatcom County to supply water and electric services. The PUD also provides administrative services to other agencies for electric, water and financial needs. The PUD was founded in 1937 and is governed under Revised Code of Washington Title 54 (RCW 54).

Statement of Mutual Interests: The Tribe and the PUD recognize that the Tribe's cultural continuity is tied to the constant ebb and flow of natural resources. Both the Tribe and the PUD share a common interest in and responsibility for the protection and enhancement of the environment, and an interest in sustainable economic development. Both Parties desire to foster a strong working partnership, through effective collaboration, open and timely communications, and the meaningful consideration of tribal and local interests and priorities. Both Parties are interested in the potential of Mount Baker as a geothermal resource to generate carbon-free power for their and other communities.

2. PROJECT DESCRIPTION

The Mount Baker Geothermal project includes areas in Whatcom County around Mount Baker. Substantial geothermal exploration work has been completed in the Baker Hot Springs area southeast of the mountain, which has been summarized in the *Geothermal Play-Fairway Analysis of Washington State Prospects: Final Report* (2021). Following this work, the Washington State Legislature allocated \$485,000 in funding to the Nooksack Tribe to complete the pre-feasibility assessment. The budget specifically calls on the Tribe to, “work

collaboratively with the PUD to retain a third-party consultant to develop a pre-feasibility study to evaluate the geothermal potential of an area near Baker Springs in Whatcom County that is located on federal lands. The pre-feasibility study is the necessary first step to determine if the Tribe and PUD should pursue a lease from the BLM as a site for carbon-free geothermal generation of electric power to serve a significant portion of the residential and commercial electric power demand of the county.”

Following recommendations of the pre-feasibility assessment, the PUD and Tribe have both expressed interest in moving forward with the feasibility assessment. Each Party has independently nominated lands in the project area for geothermal leases as the first step toward investing in additional assessment and planning work at the site. The steps covered by this MOU include lease acquisition, focused geologic and geophysical exploration, site feasibility evaluation, and continued geothermal resource assessment.

3. ROLES AND RESPONSIBILITIES

The Parties commit, to the best of their abilities, to work collaboratively to:

1. Acquire geothermal leases to support the feasibility assessment;
2. Work with the State of Washington and other interested parties to pursue funding for feasibility studies;
3. Provide support as needed to explore further for resources and to evaluate land and water supply agreements;
4. Provide support as needed for market analysis for power sales;
5. Provide support as needed for analysis of interconnection and transmission;
6. Provide support as needed for selection of technical consultants to support the feasibility assessment, and;
7. Provide support as needed for community outreach and government relations support for the project.

4. DECISION MAKING

The Parties commit to the following:

1. Decisions shall be based on the best available information;
2. Decisions shall be made by consensus of the Parties, and;
3. Disputes shall be resolved through informal staff communications, if possible. If informal communication does not achieve resolution, formal disputes will be initiated in writing to the Parties stating the disputed issues with any supporting documentation and desired outcomes.

5. TERMINATION

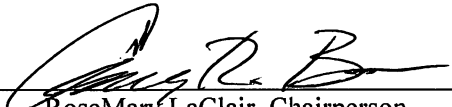
Any party to this MOU may terminate its participation with 30 days written notice of intent to terminate to the other Party.

No amendment or alteration of this MOU shall arise by implication, course of conduct, or change in state law, tribal or federal law. This MOU may be altered only by a subsequent written amendment signed by the Parties, expressly stating the Parties' intention to amend this MOU.

6. LIABILITIES/ RIGHTS

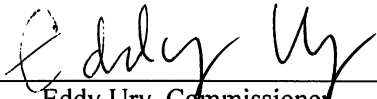
The Parties are signing this MOU to evidence their non-binding intentions and commitments. The Parties acknowledge that no legal or enforceable binding obligations are established as a result of execution of this document. Binding obligations may arise in the future upon execution of a formal written agreement, if any. Any action taken by either Party in anticipation of such formal written agreement(s) will be at the sole risk of that Party. Accordingly, nothing in this MOU shall be interpreted in any manner to create any rights or liabilities for or against any party

hereto. This MOU is entered into by the parties in a good faith effort to work collaboratively to identify carbon-free energy sources for their communities and is not entered into in order to create any legal rights or liabilities.




RoseMary LaClair, Chairperson
Nooksack Indian Tribe

Feb 17, 2026
Date



Eddy Ury, Commissioner
Whatcom Public Utilities District #1

Feb 17, 2026
Date



Atul Deshmane, Commissioner
Whatcom Public Utilities District #1

Feb 17, 2026
Date



Jaime Arnett, Commissioner
Whatcom Public Utilities District #1

Date

FIBER SYSTEM DESIGN, CONSTRUCTION, AND IRU AGREEMENT

This **FIBER SYSTEM DESIGN, CONSTRUCTION, AND IRU AGREEMENT** (“**Agreement**”) is made and entered into as of this _____ day of _____, 2026, between the **PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY**, a Washington municipal corporation, having its principal offices at 1705 Trig Rd., Ferndale, WA 98248 (the “**PUD**”), and **WHIDBEY TELEPHONE COMPANY D/B/A WHIDBEY TELECOM**, a Washington corporation, having its principal offices at 14888 SR 525 Langley, WA 98260 (“**Whidbey**”). The PUD and Whidbey are sometimes individually referred to herein as a “**Party**,” or collectively as the “**Parties**.”

I. RECITALS

1. The PUD applied for grant funding (the “**Grant**”) from the Washington State Broadband Office (the “**WSBO**”) to be used to fund open-access dark fiber-to-the-premises broadband infrastructure in the Point Roberts, WA area (the “**Project Area**”);
2. The PUD entered into a Capital Agreement with WSBO for the Grant, a copy of which is attached hereto as **Exhibit A** (the “**Grant Agreement**”);
3. The PUD is utilizing portions of the Grant funds to design, in consultation with Whidbey, an open-access dark fiber-to-the-premises broadband system in the Project Area (the “**Point Roberts System**”), the preliminary design of which is shown in **Exhibit B**;
4. Whidbey intends to build, own, operate, and maintain the Point Roberts System as designed by the PUD;
5. The PUD determined that it is in the best interest of the Point Roberts System, and the potential customers of that system, to transfer the fulfillment of the Grant obligations under the Grant Agreement to Whidbey as a subrecipient and to utilize portions of the Grant funds to reimburse Whidbey for some of Whidbey’s costs incurred to build the Point Roberts System, and Whidbey desires to become a subrecipient under the Grant for such purposes;
6. Whidbey agrees to accept full responsibility for the implementation, administration, and compliance of those aspects of the Grant Agreement applicable to Whidbey’s activities under this Agreement;
7. WSBO has reviewed and approved this transfer in accordance with its policies and procedures;
8. Whidbey owns, controls, and operates a communications network in the region (the “**Whidbey System**”);
9. The Point Roberts System will benefit from interconnection with the Whidbey System, which will further enable Whidbey and other internet service providers to use the Point Roberts System;

10. Whidbey desires to provide retail broadband and other advanced communications services utilizing the Point Roberts System; and

11. The PUD and Whidbey desire to enter into this Agreement whereby, in general (i) the PUD will design the Point Roberts System in consultation with Whidbey; (ii) Whidbey will construct the Point Roberts System; (iii) Whidbey will operate and maintain the Point Roberts System as an open-access dark fiber system in compliance with all Grant and Grant Agreement requirements; (iv) Whidbey will grant to the PUD an indefeasible right of use to a portion of the fiber optic strands within the Point Roberts System; (v) Whidbey shall have the right to utilize the Point Roberts System for all lawful purposes, including, but not limited to, offering, provisioning, and providing broadband and other advanced communication services; (vi) Whidbey will facilitate the use of the Point Roberts System by approved third-party ISPs, as defined in Section 2.18, below; and (vii) Whidbey will interconnect the Point Roberts System with the Whidbey System as necessary to operate the Point Roberts System consistent with this Agreement.

II. TERMS AND CONDITIONS

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 do hereby agree as follows:

1.0 TABLE OF EXHIBITS MADE PART OF THIS AGREEMENT.

Exhibit A:	Grant Agreement
Exhibit B:	Point Roberts System Initial Description (Subject to Final Design)
Exhibit C:	Whidbey System Description
Exhibit D:	Operations and Maintenance Specifications and Procedures
Exhibit E:	IRU Commencement Date (To Be Added by the Parties)
Exhibit F:	Forms
Exhibit G:	Federal Contracting Provisions

2.0 DEFINITIONS.

2.1 **“Agreement”** means this Fiber System Design, Construction, and IRU Agreement, and any and all Exhibits, addenda, and attachments to which the Parties may agree from time-to-time, and which reference this Fiber System Design, Construction, and IRU Agreement.

2.2 **“Applicable Standards”** means all applicable rules, regulations, and engineering and safety standards governing the installation, maintenance, as defined below, and operation of network facilities and the performance of all work in public and private rights-of-way, and includes the most current versions of National Electric Safety Code (**“NESC”**); the National Electrical Code (**“NEC”**); the regulations of the Federal Communications Commission (**“FCC”**); the Occupational Safety and Health Administration (**“OSHA”**), and other pertinent federal agencies; provisions of a city, county, or State of Washington’s building, construction, zoning, and safety codes; rules and regulations relating to permits for occupation of public rights-of-way; and/or other reasonable safety, engineering, architectural, or aesthetic requirements of a local,

state, or federal authority having jurisdiction over such facilities, each of which is incorporated by reference in to this Agreement.

2.3 **“Approved ISP”** means a provider of internet access services that desires to offer and provide Communication Services to Customers using the Point Roberts System that has signed the Whidbey ISP Agreement pursuant to Section 9.3.2, below.

2.4 **“Arbitration”** means the referral of a matter or set of issues to binding arbitration utilizing the American Arbitration Association (“**AAA**”) Commercial Arbitration Rules. The arbitrator’s decision shall be final and binding on the Parties. The arbitration shall occur within Whatcom County, and the cost shall be borne equally between the Parties. Each Party shall pay their own attorneys’ fees and costs incurred relating to this binding arbitration process. The arbitrator’s decision may be entered in a court of competent jurisdiction for enforcement purposes only.

2.5 **“Authorizations”** means the permissions a Party must have to perform its obligations under this Agreement, which may include, but is not limited to, franchises; licenses; permits; zoning approvals; variances; exemptions; grants of authority to use public rights-of-way or facilities; easements to private property; agreements to make attachments to poles, ducts, conduits, towers, buildings, rooftops, manholes, and the like; and any other approval of a governmental authority or third persons with respect to (i) the construction, installation, repair, maintenance, operation, or use of tangible or intangible public or private property, as the case may be; or (ii) any requirement by a governmental authority for the engagement in a business or enterprise.

2.6 **“Authorization Fees”** means all permit, right-of-way, easement, pole attachment, franchise, encroachment, or license fee, charge, or assessment of any kind applicable to the placement and maintenance of the Point Roberts System or the Whidbey System, as the case may be, whether imposed by a governmental authority or a private entity.

2.7 **“Case”** means a fiber optic cable splice case.

2.8 **“Communication Service”** means the services provided by an ISP (including Whidbey) to a Customer Location using the Point Roberts System, and may include, without limitation, retail and commercial broadband internet access service; data transmission service; Internet Protocol (“**IP**”) transport; Voice over Internet Protocol (“**VoIP**”) service; telecommunications service; and video service, regardless of technology used, as set forth in service agreements between an ISP and a Customer.

2.9 **“Construction Plan”** means the documentation describing the construction of the Point Roberts System by Whidbey, including a construction schedule and other relevant information provided by Whidbey subsequent to completion of the Final Design, pursuant to this Agreement.

2.10 **“Customer”** means a person, business, or other entity that lawfully receives Communication Services from an ISP via the IRU Fiber.

2.11 **“Dark Fiber”** means fiber optic strands not connected to active electronic or optronic equipment and that do not currently transmit information.

2.12 “**Effective Date**” means the date upon which this Agreement is executed by the final signatory.

2.13 “**Exclusive Use Period**” means the first three (3) years after construction of the Point Roberts System ends, during which Whidbey is the sole and exclusive ISP authorized to provide Communication Services utilizing the Point Roberts System, as set forth in Section 9.2, below.

2.14 “**FAT**” means a fiber access terminal.

2.15 “**Final Design**” means the final design of the Point Roberts System, as detailed and defined in Section 3.1 below.

2.16 “**IRU Fee**” means the fixed-fee payment from the PUD to Whidbey, as further discussed in Section 12.3, below.

2.17 “**IRU Fiber**” means those fiber optic strands and related Service Drops subject to the Point Roberts System IRU benefitting the PUD.

2.18 “**IRU Fiber Service Drop**” means those IRU Fibers installed by Whidbey, if requested by the PUD, at the PUD’s sole cost and expense, as set forth in Section 8.1.6.

2.19 “**ISP**” means a provider of internet access services.

2.20 “**Location**” means a residence, entity, or business within the Point Roberts System service area.

2.21 “**Maintenance**” or “**maintain**” means work that must be performed upon or to the Point Roberts System to ensure the continuity of acceptable signal transmission to and from a Customer, via an Approved ISP, for the purpose of delivering Communication Services by an Approved ISP in a manner consistent with industry standards and this Agreement, including, but not limited to, the Operating and Maintenance Specifications and Procedures attached hereto as **Exhibit D**.

2.22 “**NID**” means a network interface device or slack box.

2.23 “**Point Roberts System IRU**” or “**IRU**” means dark fiber optic strands and Service Drops within the Point Roberts System in which an exclusive indefeasible right of use is granted to the PUD by Whidbey pursuant to Section 5 of this Agreement. The number or percentage of fiber optic strands and related Service Drops included in the Point Roberts System IRU shall be determined and identified in the Final Design, as set forth in Section 3, below.

2.24 “**Point Roberts System**” means the fiber optic system in Point Roberts, WA to be constructed by Whidbey under this Agreement.

2.25 “**Service Area**” means those Point Roberts, WA areas intended to receive Communication Services through the Point Roberts System, as generally depicted on **Exhibit B**, hereto.

2.26 **“Service Drop”** means installation of the Service Drop Materials required to connect the NID at a Customer’s Location with the Point Roberts System at a FAT or Case so that the Customer Location can obtain Communication Services from Whidbey or an Approved ISP through the Point Roberts System.

2.27 **“Service Drop Materials”** means, in general, the fiber optic cable and other physical materials that connects the Point Roberts System to a Customer’s Location at a FAT or Case from the closest technically feasible point in the right-of-way. The Service Drop Materials consist of a common industry package of materials, which includes (i) fiber-optic cable and sheathing which will run from the FAT/Case to the NID at the Customer Location; and (ii) an NID to be attached to the Customer’s Location. Service Drops include customer premises equipment (**“CPE”**) and installation.

2.28 **“Underlying Rights”** means any and all necessary rights-of-way agreements, easements, licenses, leases, rights, or other agreements necessary for the construction, use, and occupancy of the Point Roberts System or the Whidbey System, as the case may be.

2.29 **“Whidbey Connectivity Services”** means allowing (i) Approved ISPs to connect to the Point Roberts System, so that the Approved ISPs are able to provide Communication Service to Customers; (ii) interconnection of the Point Roberts System with the Whidbey System as necessary for Whidbey and Approved ISPs to provide Communication Services through the Point Roberts System, as further described in Section 6; and (iii) interconnection of the Point Roberts System with the Whidbey System as necessary for the PUD to utilize the IRU Fiber.

2.30 **“Whidbey ISP Agreement”** means those written agreements by and between Whidbey and any ISP desiring to become an Approved ISP, as set forth in Section 9.3.2.

2.31 **“Whidbey System”** means the existing communications network and appurtenant network equipment owned and controlled by Whidbey in Point Roberts, WA.

3.0 **DESIGN OF THE POINT ROBERTS SYSTEM.**

3.1 **Generally.** The PUD shall design the Point Roberts System:

a. As an “open-access system,” as the term is generally understood in the telecommunications industry;

b. As a “dark fiber system,” as the term is generally understood in the telecommunications industry;

c. With excess fiber capacity for future homes built in the Point Roberts areas and/or reasonable expansion of the Point Roberts System;

d. To include strands of IRU Fiber and related Service Drops, which shall be reserved and held for the PUD’s sole and exclusive use and control during the Agreement Term, as discussed herein, including, but not limited to, in Section 5 below;

e. To facilitate and include Service Drops to each Location during the first (1st) year after the IRU Commencement Date, as defined in Section 5.3; and

f. To utilize and interconnect with the Whidbey System as middle-mile dark fiber and transport infrastructure, as those terms are generally understood in the fiber optic industry, for the Point Roberts System, which such services shall be provided on a commercially standard basis except as otherwise provided herein.

3.2 **PUD Final Approval of Design Services.** The PUD shall coordinate the Point Roberts System design with Whidbey to the extent necessary to ensure Whidbey's ability to perform its obligations set forth herein. The final Point Roberts System design, as approved by the Parties (the "**Final Design**"), shall be deemed part of this Agreement.

4.0 **CONSTRUCTION OF THE POINT ROBERTS SYSTEM.**

4.1 **Point Roberts System Construction.**

4.1.1 Generally.

4.1.1.1 Following approval of the Final Design and timely receipt of the final approvals described under 4.1.1.5, below, Whidbey shall construct the Point Roberts System consistent with the Final Design. All costs relating to the construction of the Point Roberts System shall be the sole responsibility of Whidbey, subject to the PUD's payment of the IRU Fee, as set forth in Section 12.3, below.

4.1.1.2 Whidbey shall be responsible for all work undertaken to construct the Point Roberts System, including methods and execution of construction, selection and oversight of contractors, and compliance with Applicable Standards.

4.1.1.3 Construction of Service Drops for the Point Roberts System shall be undertaken as described in Section 8 herein.

4.1.1.4 Whidbey shall obtain and maintain all permits, Authorizations, and Underlying Rights necessary to construct the Point Roberts System other than the approvals described in the following Section 4.1.1.5, below.

4.1.1.5 If by February 28, 2026, the PUD is unable to obtain final approval from the Washington Department of Archeology and Historic Preservation ("DAHP"), the Lummi Nation (the "Tribe"), and Puget Sound Energy ("PSE") to install equipment on their utility poles, Whidbey and the PUD shall apply for a change in scope of the Grant Agreement to remove the unapproved sections from the Point Roberts System.

4.1.1.6 Whidbey will order all the materials and supplies for the Point Roberts System (the "Equipment") by March 13, 2026 and immediately invoice the PUD for the same. The PUD shall reimburse Whidbey for the Equipment within sixty (60) days of Whidbey's receipt of the Equipment. Whidbey will attempt to stagger the Equipment purchases to help on cashflow. The inventory will be segregated and clearly marked for the Point Roberts System.

4.1.2 Construction Plan. Whidbey shall develop and provide to the PUD a detailed Construction Plan and schedule for completion of the Point Roberts System, substantially in accordance with the Final Design.

4.1.3 Changes to Construction Plan. If, during construction, Whidbey desires, (for any reason other than a change in scope necessitated as set forth in Section 4.1.1.5, above), to amend the Construction Plan, Whidbey shall be permitted to do so; provided, however, that Whidbey shall first provide reasonable advance written notice to the PUD of any such changes to the Construction Plan. In the event a change to the Construction Plan would substantially deviate from the Final Design, Whidbey shall provide reasonable advance written notice to the PUD of such proposed change and the PUD shall have ten (10) days following such notice to provide a written objection to the Whidbey, following which the Parties shall confer and negotiate, in good faith, to reach an agreement with respect to such proposed change such that any change complies with the Grant Agreement. Upon conclusion of the meet and confer, Whidbey shall issue a final written decision on its intended change to the Construction Plan or Final Design (the “**Final Design Decision**”). If the Final Design Decision is material in nature, then, within fourteen (14) days of the PUD’s receipt of the Final Design Decision, the PUD may provide written notice of its intent to terminate this Agreement to Whidbey and, so long as Whidbey does not rescind its Final Design Decision within five (5) days after receipt of the PUD’s termination notice, this Agreement shall be deemed null and void and of no further force or effect, and the Parties shall have no liability, further responsibility, or obligations hereunder except that Whidbey will be reimbursed for the cost of the work completed subject to all terms and conditions of Section 12.3, below. If Whidbey timely rescinds its Final Design Decision, this Agreement shall continue in full force and effect.

4.1.4 Timing of Construction. Whidbey shall complete construction of the Point Roberts System no later than October 31, 2026 (the “**Completion Deadline**”). Whidbey shall pay applicable prevailing wages pursuant to Chapter 39.12 RCW for all construction work on the Point Roberts System and shall provide evidence of compliance with the same to the PUD.

4.1.5 Notice of Completion to the PUD. At least twenty (20) days before performing final testing on the Point Roberts System, Whidbey shall provide written notice to the PUD of the date and time of such testing to permit a PUD-designated representative to attend and observe such testing. After such final testing, and when Whidbey gives written notice (including by e-mail) to the PUD that the Point Roberts System is complete (the “**Notice of Completion**”), the PUD shall have ten (10) business days to verify that the Point Roberts System is complete pursuant to the Final Design and to provide all reasonably required testing data confirming the same; however, the PUD shall not be required to conduct such verification. On or before the expiration of the ten (10)-business day period, the PUD will provide notice that it either accepts the Point Roberts System as complete and substantially in compliance with the Final Design (the “**Notice of Acceptance**”) or rejects it pending completion of “punch-list corrections” by specifying the defect or failure in the Point Roberts System that is the basis for such rejection and the required remedy, which Whidbey shall complete within thirty (30) days. If the PUD fails to notify Whidbey of its acceptance or rejection of the Point Roberts System within ten (10) business days following the PUD’s receipt of Whidbey’s Notice of Completion, the PUD shall be deemed to have accepted the Point Roberts System as complete pursuant to the Final Design. The date of such Notice of Acceptance or deemed acceptance of the Point Roberts System shall be the “**Acceptance Date**.” In the event of any good faith rejection by the PUD, Whidbey shall take such action as reasonably necessary, and as expeditiously as practicable, to correct or cure such defect or failure.

4.1.6 Completed System Testing. Upon completion of the Point Roberts System, Whidbey shall test the Point Roberts System to verify that the Point Roberts System is

operating appropriately with a loss no greater than the designed loss budget set forth in the approved Final Design. Whidbey will provide the results of these tests to the PUD for verification. When Whidbey has determined that the Point Roberts System has been installed and is operating appropriately, Whidbey shall promptly provide a Notice of Completion to the PUD, pursuant to 4.1.5, above, confirming that the Point Roberts System is complete.

4.1.7 Point Roberts System Relocation. If, after completion of the Point Roberts System, Whidbey is required to relocate the Point Roberts System, or any portion thereof, (i) by any governmental authority under the power of eminent domain or otherwise; (ii) by the grantor or provider of any Underlying Rights; (iii) by any other person having the authority to so require (each a “**Relocating Authority**”); or (iv) by the occurrence of any Force Majeure Event, as defined in Section 24, Whidbey shall notify the PUD of the same, and Whidbey shall have the right to either (a) proceed with such relocation at Whidbey’s sole cost and expense, including, but not limited to, the right, in good faith, to reasonably determine the extent and timing of, and methods to be used for, such relocation; or (b) pay such amounts to the Relocating Authority as are necessary to avoid the need for such relocation at Whidbey’s sole cost and expense.

5.0 GRANT OF POINT ROBERTS SYSTEM IRU TO PUD.

5.1 In consideration of the PUD’s obligations under this Agreement, including, but not limited to, payment of the IRU Fee, Whidbey grants to the PUD, and the PUD accepts from Whidbey, an exclusive, indefeasible right of use in the IRU Fibers, as further set forth in this Section 5, i.e., the Point Roberts System IRU.

5.2 **Description.** The PUD shall be entitled to utilize the IRU Fiber during the Agreement Term, as defined in Section 13, below, for any and all lawful purposes determined by the PUD in its sole discretion, with all costs and expenses relating to such use (including, without limitation, interconnection of third-party systems with the IRU Fiber) being the sole responsibility of the PUD. Without limiting the generality of the foregoing, and provided that the PUD shall not provide Communication Services through the IRU Fiber, the PUD shall be entitled to authorize other municipal entities to utilize the IRU Fiber.

5.3 **Testing and Acceptance; Commencement of IRU.** The Point Roberts System IRU shall commence upon the Acceptance Date (the “**IRU Commencement Date**”). No later than thirty (30) days after the IRU Commencement Date, the PUD and Whidbey shall attach a written document to this Agreement setting forth the IRU Commencement Date as **Exhibit E**, hereto.

5.4 **Underlying Rights.** Whidbey shall obtain all required Underlying Rights relating to the Point Roberts System, including the IRU Fiber, and use commercially reasonable efforts to maintain such Underlying Rights for the duration of the Agreement Term. The IRU is subject to the terms, conditions, limitations, restrictions, and reservations of the Underlying Rights, and subject to the terms under which the right-of-way and other property interests are owned or held by the grantor of the Underlying Rights, including, but not limited to, covenants, conditions, restrictions, easements, reversionary interests, bonds, mortgages and indentures, and other matters, whether or not of record, and to the rights of tenants and licensees in possession.

5.5 **Ownership; No Liens, Rights, or Claims.** At no time during the Agreement Term shall the PUD either obtain legal ownership of the IRU Fibers nor allow the IRU Fibers to be made subject to any encumbrance, lien, or security interest by any third party. If such a lien, right or claim is asserted, the PUD will promptly and diligently undertake its removal at the sole cost of the PUD.

5.6 **Communication Services.** Communication Services shall be provided on the Point Roberts System by Whidbey or an Approved ISP only. The specific number or proportion of IRU Fiber strands made part of the Point Roberts System IRU shall be identified in the Final Design.

5.7 **Other Licenses.** Provided that any such agreement shall not violate the terms and conditions of this Agreement, and that any such agreement shall prohibit provision of retail Communication Services through the IRU Fiber, nothing in this Section shall be deemed or construed to prohibit the PUD from leasing, licensing, subleasing, or entering into similar agreements or arrangements with other persons respecting the IRU Fiber.

6.0 **OPERATION OF POINT ROBERTS SYSTEM.**

6.1 **Generally.** After the Exclusive Use Period expires, and throughout the Agreement Term, as defined in Section 13, below, Whidbey shall provide the Whidbey Connectivity Services to Approved ISPs, which shall include, but not be limited to, operating the Point Roberts System as a wholesale open-access dark fiber network enabling Approved ISPs to provide Communication Services to Customer Locations.

6.2 **Limited to Point Roberts System.** Unless otherwise agreed to by the Parties, the Whidbey Connectivity Services shall apply only to the Point Roberts System.

6.3 **Ongoing Operation.** Whidbey will coordinate the provision of the Whidbey Connectivity Services to Approved ISPs in accordance with this Agreement, including, but not limited to, Section 9. Whidbey will offer retail Communication Services in accordance with Section 9.5.

6.4 **Authorizations.** Whidbey shall be responsible for obtaining any new, and maintaining all existing, Authorizations, and the payment of Authorization Fees applicable thereto and relating to the activities of Whidbey described in this Agreement, including, but not limited to, all such Authorization Fees related to the Point Roberts System. As used herein, "maintaining" means complying with and performing any and all obligations required of Whidbey in the Authorizations, including, but not limited to, insurance, indemnification, maintenance and repair, and/or restoration requirements set forth in the Authorizations. All activities of Whidbey described in this Agreement shall be performed in accordance with any and all Applicable Standards, Authorizations, industry standards, and applicable law.

7.0 **SYSTEM MAINTENANCE.**

7.1 **Maintenance of Point Roberts System.**

7.1.1 Whidbey shall, at its sole cost and expense, physically maintain the entire Point Roberts System (including the IRU Fiber), in a serviceable condition, taking commercially

reasonable measures so that the Point Roberts System will meet or exceed common industry standards for performance of similar dark fiber facilities of like age under like circumstances. Whidbey shall not permit the Point Roberts System to be damaged or depreciated in value by any grossly negligent or intentional act or omission of Whidbey, and/or its agents or employees.

7.1.2 Whidbey shall perform all required maintenance services relating to the Point Roberts System. Whidbey shall identify, repair, and correct any material failure, interruption, or impairment in the operation of the Point Roberts System.

7.1.3 Without limiting the generality of the foregoing, Whidbey's maintenance obligations are further specified in the Operations and Maintenance Specifications and Procedures, attached hereto as **Exhibit D**.

7.1.4 Without limiting the generality of the foregoing, Whidbey shall schedule and perform periodic inspections (at a minimum, annually), and shall identify, repair, and correct any material failure, interruption, or impairment in the operation of the Point Roberts System.

7.2 **Maintenance of Whidbey System.** Whidbey shall, at its sole cost and expense, except as otherwise provided in this Agreement, care for and maintain the components of the Whidbey System required to provide service or interconnections to the Point Roberts System in a safe and serviceable condition, so that the Whidbey Connectivity Services involving middle-mile transport using the Whidbey System will meet or exceed common industry standards for performance of like facilities of like age under like circumstances. Whidbey shall schedule and perform periodic inspections (at a minimum, annually), and shall identify, repair, and correct any material failure, interruption, or impairment in the operation of the Whidbey System.

7.3 **NOC.** Whidbey shall operate a Network Operations Center ("**NOC**") to support the operation of the Point Roberts System.

7.4 **Interruptions Involving Whidbey Connectivity Services.** As further described in the Operations and Maintenance Specifications Procedures, attached hereto as **Exhibit D**:

7.4.1 Whidbey shall respond promptly to any reasonable complaints from the PUD or any Approved ISP utilizing Whidbey Connectivity Services.

7.4.2 The PUD shall immediately notify Whidbey's NOC, or Whidbey's personnel included in the Operations Escalation List set forth in **Exhibit D**, upon learning of any material interruption of Whidbey Connectivity Services. As soon as reasonably practicable thereafter, Whidbey shall notify the PUD of a restoration plan and timeline to complete restoration. Whidbey shall provide periodic progress updates to the PUD until the outage is restored.

7.4.3 Whidbey shall respond to a material interruption of the Whidbey Connectivity Services within twenty-four (24) hours of receiving notice of such interruption, and Whidbey shall continue diligently to remedy the interruption until cured. If such interruption is not remedied after forty-eight (48) hours of reporting, the PUD may remedy the interruption, and the reasonable, actual costs of which shall be reimbursed by Whidbey.

7.5 **Customer Location Maintenance; Demarcation.** For Locations receiving Communication Services from an Approved ISP other than Whidbey, Whidbey shall be responsible, at its sole cost and expense, for maintenance and repair of the Point Roberts System path up to the NID on the exterior of the Customer's Location. For clarity, any maintenance and repair "downstream" from the NID (i.e., towards the Customer's Location served) is the responsibility of the Approved ISP providing Communication Services to the Customer, and any maintenance and repair "upstream" from the NID (i.e., away from the Customer's Location served) is Whidbey's responsibility.

7.6 **Responsibility for Repair Cost.** Notwithstanding the foregoing, in the event the PUD, and/or its agents, damage or permit damage to occur to the Whidbey System or the Point Roberts System, Whidbey shall be entitled to prompt reimbursement for the full costs and expenses of the repair of such damage, including, but not limited to, reimbursement for damages associated with third-party claims related thereto, and Whidbey shall invoice the PUD for the reasonable and industry-standard costs to repair any such damage.

7.7 **Notice of Impending Damage.** The PUD and Whidbey shall promptly notify each other of any known matters pertaining to, or the occurrence (or impending occurrence) of, any event that would be reasonably likely to give rise to any damage, or impending damage, to or loss of the Point Roberts System or the Whidbey System that are known to such Party.

8.0 **SERVICE DROPS.**

8.1 **Service Drop Installation.**

8.1.1 As part of the initial construction of the Point Roberts System, Whidbey will acquire a supply of Service Drop Materials for the number of Locations reasonably anticipated to connect to the Point Roberts System via Service Drops during the first (1st) year after the IRU Commencement Date (the "**Service Drop Materials Supply**"). The estimate of anticipated service connections in the first (1st) year will be quantified as part of the Final Design. During the first (1st) year after the IRU Commencement Date or until the Service Drop Materials Supply is exhausted, whichever comes later, Whidbey will use the Service Drop Materials to connect Customers to the Point Roberts System. Thereafter, Whidbey shall be responsible for securing any Service Drop Materials required to connect Whidbey or other Approved ISPs to the Point Roberts System.

8.1.2 After expiration of the Exclusive Use Period, Whidbey shall install Service Drops for Approved ISPs desiring to provide Communication Services to Customers through the Point Roberts System. Whidbey shall be entitled to charge the Approved ISPs for such Service Drop installations as set forth in Section 12.1.1, below.

8.1.3 Whidbey will be responsible for obtaining all Authorizations and Underlying Rights for installing Service Drops.

8.1.4 Whidbey shall maintain up-to-date documentation of all such Service Drop installations and/or other modifications to the Point Roberts System, and shall make such documentation available to the PUD at all reasonable times.

8.1.5 Once installed, all Service Drops shall become part of the Point Roberts System owned by Whidbey and, except as otherwise necessary to comply with an Authorization or Underlying Right (or the revocation or termination of same), the Service Drop shall remain in place when Whidbey or any Approved ISP stops providing Communication Services to the Location at which it was installed.

8.1.6 IRU Fiber Service Drops. Notwithstanding anything to the contrary herein, and if requested by the PUD, Whidbey shall, at the PUD's sole cost and expense, install Service Drops interconnecting with the IRU Fiber, which such request Whidbey shall not unreasonably condition, delay, or deny ("**IRU Fiber Service Drop**"). Except as explicitly permitted by Whidbey, no Party other than Whidbey shall be authorized or permitted to perform such work on the Point Roberts System. Whidbey shall charge the PUD a reasonable market-based rate for any requested IRU Fiber Service Drop installations. The PUD shall be responsible for (a) obtaining, at no cost or expense to Whidbey, all Authorizations and Underlying Rights required for such IRU Fiber Service Drop and its installation. Whidbey shall be responsible for (i) all work associated with the installation of such IRU Fiber Service Drop, including fiber splicing; (ii) performing such installation in full compliance with any and all permits, Underlying Rights, Authorizations, Applicable Standards, and industry standards, subject to Whidbey's right to charge the PUD for the same; and (iii) the full cost and expense of removal of any such IRU Fiber Service Drop should the same be required (and which Whidbey shall be the sole authorized Party to perform).

9.0 **COORDINATION OF OPEN-ACCESS SERVICES AND EXCLUSIVE USE PERIOD.**

9.1 **Coordination of Services to Customers.** Clear and timely communication between or among the PUD, Whidbey, and Approved ISPs is crucial to the effective operation of the Point Roberts System as an open-access dark fiber network. The Parties shall use commercially reasonable efforts to quickly and efficiently communicate between themselves, and with Approved ISPs, to ensure that Customers do not experience unnecessary connection delays, service interruptions, and/or disconnections.

9.2 **Exclusive Use Period.**

9.2.1 During the Exclusive Use Period, Whidbey has the sole and exclusive right to provide Communication Services to Customer Locations using the Point Roberts System. During the Exclusive Use Period, Whidbey is not required to allow Approved ISPs to utilize the Point Roberts System to provide Communication Services. Notwithstanding the foregoing, nothing herein restricts the PUD's ability to utilize the IRU Fiber for any purpose set forth herein, including, but not limited, as set forth in Section 5.

9.3 **Agreement By, and Access For, ISPs.**

9.3.1 After expiration of the Exclusive Use Period, and for the duration of the Agreement Term, as defined in Section 13, below, upon request, and subject to the further requirements in this Section 9.3, Whidbey will (i) make available Whidbey Connectivity Services to any Approved ISPs desiring to provide Communication Services to Customers through the Point Roberts System.

9.3.2 From and after the expiration of the Exclusive Use Period, and for the duration of the Agreement Term, as defined in Section 13, below, any ISP desiring to become an Approved ISP shall enter into a written agreement with Whidbey (each a “**Whidbey ISP Agreement**”), the form of which, and any amendments thereto, shall be developed in consultation with, and be provided to, the PUD, and shall contain industry standard terms. Pursuant to such Whidbey ISP Agreement, each such Approved ISP shall timely remit payment to Whidbey for all fees charged by Whidbey pursuant to Section 12, below.

9.3.3 Notwithstanding anything to the contrary herein, except to the extent necessary in the event of an emergency requiring such termination or limiting for security or safety purposes, Whidbey shall not take any action to terminate or limit an Approved ISP’s use of or access to the Whidbey Connectivity Services or the Point Roberts System for breach of the Whidbey ISP Agreement (including failure to pay any amounts owed to Whidbey thereunder) without first providing the Approved ISP at least ten (10) days’ prior written notice (e-mail being sufficient) and opportunity to cure such Approved ISP’s breach.

9.4 **Provision of Retail Communication Services by Whidbey.**

9.4.1 Provision of Communication Services. Whidbey may provide Communication Services to Customers, in its sole discretion and at its sole cost.

9.4.2 Affordable Connectivity Program. During the Agreement Term, as defined in Section 13, below, Whidbey shall (i) provide access to a broad-based affordability program to low-income consumers to whom Whidbey provides broadband internet access service(s) through the Point Roberts System, which affordability program provides benefits to households commensurate with those provided under the former Affordable Connectivity Program (“**ACP**”); and (ii) require that any Approved ISPs utilizing the Point Roberts System provide access to a broad-based affordability program to low-income consumers to whom such Approved ISPs provide broadband internet access service(s) through the Point Roberts System, which affordability program provides benefits to households commensurate with those provided under the former ACP.

10.0 **GRANT SUBRECIPIENT COMPLIANCE TERMS.**

10.1 **Subrecipient.** Whidbey constitutes a subrecipient under the Grant for purposes of the Point Roberts System.

10.2 **Grant Information.** The Grant is part of a federal award, requiring disclosure of the following information:

10.2.1 Subrecipient Name: Whidbey Telephone Company;

10.2.2 Subrecipient’s Unique Entity Identifier: R96YJCJ4NQG15;

10.2.3 Federal Award Identification Number: CPFFN0145;

10.2.4 Federal Award Date: May 1, 2023;

10.2.5 Subaward Period of Performance Start Date: The Effective Date of this Agreement;

10.2.6 Subaward Period of Performance End Date: The Completion Deadline, set forth below;

10.2.7 Subaward Budget Period State and End Date: Not applicable, as this is a fixed-amount subaward;

10.2.8 Amount of Federal Funds Obligated by this Action by the PUD, as Recipient under the Grant, to Whidbey, as a Subrecipient under the Grant: The IRU Fee;

10.2.9 Total Amount of the Federal Award committed to Whidbey, as Subrecipient, by the PUD, as the Pass-Through Entity, including the Current Financial Obligations: The IRU Fee;

10.2.10 Federal Award Project Description, as Required to be Responsive to the Federal Funding Accountability and Transparency Act (“FFATA”): Construction of last mile dark fiber optic-based broadband in and around Point Roberts, WA to provide up to ten megabits per second (10 Mbps) download and between twenty and one hundred megabits per second (20-100 Mbps) download for approximately one thousand (1,000) locations;

10.2.11 Federal Awarding Agency: United States Department of Treasury;

10.2.12 Pass-Through Entity and Contact Information for Awarding Official of the Pass-Through Entity: Public Utility District No. 1 of Whatcom County, Attn: Broadband Manager, 1705 Trigg Rd., Ferndale, WA 98248;

10.2.13 Assistance Listing Number and Title: 21.029 American Rescue Plan Act- Coronavirus Capital Projects Fund;

10.2.14 The award is not R&D; and

10.2.15 Negotiated Indirect Cost Rate Between Whidbey and the PUD: Not applicable, as this is a fixed-amount subaward.

10.3 **Certification.** Upon substantial completion of the Point Roberts System, but in no case later than December 31, 2026 (the “Completion Deadline”), Whidbey shall certify in writing to the PUD that the Point Roberts System has reached substantial completion with the approved Final Design.

10.4 **Federal Interest Period.** Without limiting any other terms or conditions of this Agreement, and notwithstanding the fact that Whidbey shall own the Point Roberts System, the United States Department of the Treasury (the “**Treasury**”) shall have an interest in the Point Roberts System, commencing upon PUD’s payment of the IRU Fee until December 31, 2049 (the “**Federal Interest Period**”). During the Federal Interest Period, Whidbey, or its successors or transferees:

10.4.1 Must use the funded infrastructure for the authorized purposes of the Point Roberts System in the same manner as they use comparable real property and equipment within the other portions of Whidbey's telecommunications system in the ordinary course of Whidbey's business, subject to the rights to disposition provided below;

10.4.2 Must continue to provide internet service to the Project Area at the following minimum standards: one hundred megabits per second (100 Mbps) download with between twenty and one hundred megabits per second (20-100 Mbps) upload speeds that are scalable to a minimum of one hundred megabits per second (100 Mbps) symmetrical upload/download speeds;

10.4.3 Within the Project Area, must participate in any federal programs that provide low-income consumers with subsidies on broadband internet access services;

10.4.4 When acquiring replacement equipment for the Point Roberts System, Whidbey may use the equipment being replaced as a trade-in or it may sell the equipment being replaced, so long as it uses the proceeds from such sale to offset the cost of the replacement property;

10.4.5 Must utilize equipment management procedures for the Point Roberts System, which, at a minimum, shall meet the following requirements:

10.4.5.1 Property records must be maintained that include a description of the property; a serial number or other identification number; the source of funding for the property (including the FAIN); the acquisition date, the cost of the property, and who holds title; the percentage of federal participation in the project costs for the federal award under which the property was acquired; the location, use, and condition of the property; and any ultimate disposition data, including the date of disposal and sale price of the property;

10.4.5.2 A physical inventory of the property must be taken and the results reconciled with the property records at least once every two (2) years;

10.4.5.3 A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property, and any loss, damage, or theft must be investigated;

10.4.5.4 Adequate maintenance procedures must be developed to keep the property in good condition; and

10.4.5.5 If Whidbey is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

10.4.6 May dispose of the Point Roberts System equipment in the ordinary course of Whidbey's business when such equipment is no longer needed to operate the Point Roberts System (for example, in order to upgrade equipment and improve facilities); provided, however, that at least the same level of service provided by the Point Roberts System is maintained and there is no material interruption to service, and that such upgraded equipment is

subject to the same requirements provided in this Section 10 as the original Point Roberts System equipment;

10.4.7 May otherwise sell or transfer Point Roberts System equipment only after (i) provision of a notice to the PUD and the Treasury that identifies the successor or transferee; (ii) securing the agreement of the successor or transferee to comply with the requirements of this Agreement, including this Section 10; and (iii) the acknowledgement of the successor or transferee of the federal interests for the duration of the Federal Interest Period as set forth in this Section 10; and

10.4.8 Must notify the PUD and the Treasury upon the filing of a petition under the United States Bankruptcy Code, whether voluntary or involuntary, with respect to Whidbey or its affiliates.

10.5 **Point Roberts System Held in Trust.** Pursuant to 2 CFR 200.316, and in recognition that the Grant is for the benefit of the public being served by the broadband infrastructure, for the duration of the Federal Interest Period, Whidbey shall hold the Point Roberts System in trust for the beneficiaries of the broadband infrastructure project.

10.6 **Project Area Encumbrances.** Notwithstanding anything else in this Agreement, during the Federal Interest Period, Whidbey may encumber the Point Roberts System equipment only if the Treasury receives a shared first lien position in the Point Roberts System such that if the Point Roberts System equipment were foreclosed upon and liquidated, the Treasury would receive the portion of the fair market value of the Point Roberts System equipment that is equal to the Treasury's percentage contribution to the Point Roberts System's project costs. Whidbey shall obtain the Treasury's prior written approval. For example, in the case in which the Treasury had contributed fifty percent (50%) of the project costs, the Treasury would receive fifty percent (50%) of the fair market value of the Point Roberts System equipment when liquidated. The Treasury will post standard forms of liens, covenants, and intercreditor agreements to implement this arrangement. The Treasury will not otherwise require that Whidbey follow these requirements to record liens or other notices of record.

10.7 **Project Area Audits.** Whidbey has provided cost estimate documents regarding the Point Roberts System construction costs, which documents the PUD utilized in establishing the IRU Fee. During and after construction of the Point Roberts System, Whidbey shall, upon the PUD's request, provide supporting documentation evidencing Whidbey's actual costs and expenses incurred in constructing the Point Roberts System, including, but not limited to, payrolls, receipts, and invoices, to allow the PUD to audit the actual construction costs for the Point Roberts System as required by 2 CFR §200.501. Whidbey shall cooperate with any other audits related to or arising out of the Point Roberts System required by law and/or the Grant Agreement. Whidbey shall reimburse the PUD for all of the PUD's costs and expenses incurred relating to any audits of the Point Roberts System required by law and/or the Grant Agreement, including, but not limited to, third-party consultant costs and wages paid to the PUD's staff for hours working on such audits, no later than thirty (30) days after Whidbey's receipt of an invoice for the same.

10.8 **Cooperation with Grant Agreement Compliance.** Whidbey shall comply with the terms and conditions of the Grant Agreement as they relate to the Point Roberts System. Furthermore, Whidbey shall cooperate with the PUD to ensure the Point Roberts System

complies with the Grant Agreement, including, but not limited to, providing status reports to and/or meeting with the PUD, and providing any documents related to the Point Roberts System upon request during construction of the Point Roberts System and throughout the Agreement Term, as defined in Section 13. Whidbey shall gather, compile, and provide the PUD with project details in the form required for any reporting requirements related to the Point Roberts System required by law and/or the Grant Agreement, including, but not limited to, the forms and timelines attached hereto as **Exhibit F**; however, such forms are subject to change if required by WSBO.

10.9 Federal Procurement, Cost Principal, and Property Standards Exemption. Pursuant to the CPF Supplementary Broadband Guidance dated May 17, 2023, except as specifically set forth in this Section 10, Whidbey, as a subrecipient receiving a fixed-fee subaward, is exempt from complying with (i) the federal cost principles set forth in 2 CFR Part 200, Subpart E; (ii) the federal procurement requirements set forth in 2 CFR §§ 200.318 through 200.327; and (iii) the federal property standards set forth in 2 C.F.R §§ 200.311 and 200.313 through 200.315, all for so long as Whidbey timely certifies completion of the Point Roberts System under Paragraph 10.3, above.

10.10 Environmental Law Compliance. With respect to the Point Roberts System, Whidbey shall comply with all Applicable Standards, orders, or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387).

10.11 Debarment and Suspension. Whidbey represents and warrants that it is not listed as barred or suspended from participation in federal government programs in the System for Award Management (“**SAM**”), in accordance with the Office of Management and Budget guidelines at 2 CFR §180 that implement Executive Orders 12549 (3 CFR Part 1986 Comp., p. 189) and 12689 (3 CFR Part 1989 Comp., p. 235), “Debarment and Suspension.”

10.12 Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment. Whidbey is prohibited from obligating or expending any portion of the IRU Fee to:

10.12.1 Procure or obtain;

10.12.2 Extend or renew a contract to procure or obtain; or

10.12.3 Enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in Public Law 115-232, Section 889, “**covered telecommunications equipment**” is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities):

10.12.3.1 For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

10.12.3.2 Telecommunications or video surveillance services provided by such entities or using such equipment; and

10.12.3.3 Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

10.13 **Domestic Procurement Preferences.**

10.13.1 As appropriate, and to the extent consistent with law, Whidbey should, to the greatest extent practicable when constructing the Point Roberts System, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including, but not limited to, iron, aluminum, steel, cement, and other manufactured products). Whidbey shall include this Section 10.13 in all contracts and purchase orders for work or products relating to the Point Roberts System.

10.13.2 For purposes of this Section:

10.13.2.1 “**Produced in the United States**” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States; and

10.13.2.2 “**Manufactured products**” means items and construction materials composed, in whole or in part, of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

10.14 **Additional Federal Contracting Assurances.** Whidbey makes the additional assurances set forth in **Exhibit G** hereto.

10.15 **Required Federal Standard Provisions.** Whidbey acknowledges, and shall comply with, the Required Federal Standard Provisions attached hereto as **Exhibit G**.

11.0 **USE OF SYSTEMS.**

11.1 **Compliance with Applicable Laws and Regulations.** Each Party will use the Point Roberts System in compliance with and subject to all applicable government codes, ordinances, laws, rules, and regulations, as they now exist or are hereinafter amended.

11.2 **Limited Rights to Use.** The PUD agrees and acknowledges that it has no right to use the Point Roberts System other than in connection with the IRU.

11.3 **No Interference.** The PUD shall not use the IRU Fibers in any way that materially interferes with or adversely affects the use of Whidbey’s services provided to any other person using Whidbey Connectivity Services or the Point Roberts System. Whidbey shall not use or permit the use of Whidbey Connectivity Services nor the Point Roberts System in any way that materially interferes with or adversely affects the IRU.

12.0 FEES AND CHARGES.

12.1 **Fees Whidbey May Charge ISPs.** As the sole and exclusive consideration for such Whidbey Connectivity Services, Whidbey shall have the right to charge Approved ISPs reasonable, market-based, wholesale rates comparable to other service provider's wholesale rates in the region for the Whidbey Connectivity Services. Further, Whidbey shall ensure that Approved ISP's may use network services and facilities at rates, terms, and conditions that are not discriminatory or preferential between providers.

12.1.1 **Fees for Additional Services.** In the event an Approved ISP requests services from Whidbey not addressed in this Agreement, and Whidbey agrees to provide such services, Whidbey may charge a reasonable, market-based fee in exchange for such services.

12.2 **Reporting Requirements.** Whidbey shall provide the PUD all information regarding Customers using the Point Roberts System as required by the Grant Agreement in a method and form as the Parties mutually agree, or as otherwise required in the Grant Agreement, on such intervals as required by the Grant Agreement.

12.3 **IRU Fee.** In exchange for the rights and services received hereunder, the PUD shall pay Whidbey the "IRU Fee" which shall be calculated as follows: the total Grant amount of Three Million Three Hundred Sixty-Eight Thousand Dollars (\$3,368,000.00) LESS the total cost of all "Make Ready Fees" paid by the PUD to Puget Sound Energy related to the Point Roberts System. The term Make Ready Fees, as used herein, shall mean any and all costs paid by the PUD to PSE from the Grant related to the Point Roberts System including, but not limited to, construction materials, engineering fees, construction labor, traffic controls, and permitting costs up to a maximum of One Million Five Hundred Thousand Dollars (\$1,500,000.00) (the "Make Ready Cap"). The PUD and Whidbey estimate the total Make Ready Fees will be approximately One Million Dollars (\$1,000,000.00). The IRU Fee shall be considered a fixed-amount subaward from the PUD, as the recipient of the Grant, to Whidbey, as a subrecipient under the Grant. The IRU Fee shall be due and payable within thirty (30) days after all of the following conditions are met: (i) the Acceptance Date for the Point Roberts System; (ii) the PUD's receipt of Whidbey's invoice for the IRU Fee, accompanied by Whidbey's W-9; (iii) the PUD's receipt from Whidbey of all documentation required to support the PUD's submission of expenses in order to be reimbursed by WSBO under the Grant; and (iv) the PUD's receipt of the IRU Fee from WSBO under the Grant. Notwithstanding the foregoing, in the event the PUD is able to receive monthly or quarterly payments from WSBO under the Grant for work performed by Whidbey on the Point Roberts System during the preceding month or quarter, Whidbey shall be entitled to a payment from the PUD with respect to such work performed as partial payment of the IRU Fee. In the event the PUD is required to reimburse WSBO for any portion of the IRU Fee as a result of Whidbey's failure to comply with the terms of this Agreement, including, but not limited to, the terms of the Grant Agreement, then Whidbey shall proportionally reimburse the PUD for the same amount no later than thirty (30) days after the PUD's demand. In no case shall the PUD be obligated to pay the IRU Fee, or any portion thereof, to Whidbey unless, and until, the PUD receives payment for the same from the Grant, and the PUD's receipt of such funds shall be an absolute condition precedent to the PUD's obligation to pay the same to Whidbey.

13.0 TERM AND TERMINATION.

13.1 **Term.** This Agreement shall commence on the Effective Date and terminate twenty-five (25) years after the Acceptance Date (the “**Agreement Term**”).

13.2 **Early Termination.** This Agreement may be terminated prior to expiration of the Agreement Term for the following reasons:

13.2.1 In the event the Grant is not awarded, or is revoked, prior to completion of the Point Roberts System construction, the PUD may terminate this Agreement without penalty;

13.2.2 In the event the Make Ready Fees exceed the Make Ready Cap;

13.2.3 Except as set forth in Section 15.3, below, a non-defaulting Party may terminate this Agreement as a remedy in the event of an uncured material breach by the other Party, in accordance with Section 15, below; or

13.2.4 By the mutual agreement of the Parties.

13.3 Except as expressly provided elsewhere in this Agreement, termination or expiration of this Agreement shall not affect the rights or obligations of either Party that have arisen before the date of termination or expiration, and, as applied to such rights and obligations, this Agreement shall remain in full force and effect until such rights and obligations have been fulfilled or waived.

13.4 **Bankruptcy.**

13.4.1 Upon the occurrence of a bankruptcy or insolvency condition described below, the PUD, and not Whidbey, may proceed under the default and remedy procedures described in Section 15:

13.4.1.1 Whidbey commences a voluntary case under Title 11 of the United States Bankruptcy Code or the corresponding provisions of any successor laws;

13.4.1.2 Any person commences an involuntary case against Whidbey under Title 11 of the United States Bankruptcy Code or the corresponding provisions of any successor laws and either (a) the case is not dismissed by midnight at the end of the sixtieth (60th) day after commencement; or (b) the court before which the case is pending issues an order for relief or similar order approving the case;

13.4.1.3 A court of competent jurisdiction appoints, or Whidbey makes an assignment of all or substantially all its assets relating to this Agreement to, a custodian (as that term is defined in Title 11 of the United States Bankruptcy Code or the corresponding provisions of any successor laws) for Whidbey of all or substantially all its assets; or

13.4.1.4 Whidbey fails generally to pay its debts as they become due (unless those debts are subject to a good faith dispute as to liability or amount) or acknowledges in writing that it is unable to do so.

13.4.2 The Parties agree and acknowledge that, notwithstanding the occurrence of a bankruptcy or insolvency condition described above, Whidbey shall be required to continue to perform its obligations under this Agreement without interruption. Whidbey and the PUD acknowledge that the market value of the Whidbey System, the Point Roberts System, and the Point Roberts System IRU will be significantly and adversely affected in the event of a cessation or interruption of the Whidbey Connectivity Services, the maintenance of the Point Roberts System, and other Whidbey obligations set forth in this Agreement. Unless this Agreement is terminated by the PUD following a Whidbey bankruptcy or insolvency, Whidbey shall continue to provide Whidbey Connectivity Services and maintain the Point Roberts System throughout such bankruptcy proceeding to the extent permitted by law, and the consideration for such continued Whidbey Connectivity Services is included as part of the consideration received by Whidbey in this Agreement.

13.5 **Events Upon Termination.** Termination of this Agreement shall not affect the rights or obligations of either Party that have arisen before the date of termination or expiration.

14.0 **ASSIGNMENT.**

14.1 **Generally.** Except as otherwise provided herein, neither Party may assign this Agreement, or any rights or duties under this Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably delayed, conditioned, or withheld. Notwithstanding the foregoing, the PUD can reasonably assign this Agreement, or any rights or duties under this Agreement, to another municipal corporation or an entity wholly owned by municipal corporations without the prior written consent of Whidbey.

14.2 **Assignment to Affiliate of Whidbey.** The foregoing notwithstanding, Whidbey (referred to in this Section 14.2 as the “**Assigning Party**”) may, without the prior consent of, but upon notice to, the PUD, assign this Agreement to an affiliate of the Assigning Party, the parent of the Assigning Party, or to any company into which the Assigning Party may be merged or consolidated, or that acquires substantially all of the assets or stock of Assigning Party; provided, however, that the assignee shall be subject to all the provisions of this Agreement. An “**affiliate**” of the Assigning Party shall mean any corporation which, directly or indirectly, controls, is controlled by, or is under common control with the Assigning Party, or a successor corporation to the Assigning Party by merger, consolidation, or non-bankruptcy reorganization. For purposes of the definition of “**affiliate**,” the word “**control**” (including “**controlled by**” and “**under common control with**”) shall mean, with respect to any corporation, partnership, or association, the possession, directly or indirectly, of the power to direct, or to cause the direction of, the management and policy of a particular corporation, partnership, or association, whether through the ownership of voting securities, by contract, or otherwise. Whidbey shall not attempt to circumvent any of its obligations under this Agreement, or to deprive the PUD of any anticipated benefit under this Agreement, through the use of ownership changes, reorganizations, creation of new entities, or other artificial devices.

14.3 **Assignment for Collateral.** Each Party (referred to in this Section 14.3 as the “**Assigning Party**”) shall also have the right, upon thirty (30) days’ prior written notice, and without the other Party’s consent, to assign or otherwise transfer this Agreement as collateral to any institutional lender or as bond collateral (including revenue bonds) to the Assigning Party (or institutional lender to any permitted transferee or assignee of the Assigning Party); provided, however, that the Assigning Party and assignee or transferee in any such circumstance shall

continue to be subject to all of the provisions of this Agreement, and, upon execution on the collateral, shall be responsible for the performance of all terms and conditions of this Agreement until such time as it transfers the collateral. The assignee shall not be restricted from exercising any right of enforcement or foreclosure, with respect to any related security interest or lien, so long as the purchaser in foreclosure is subject to the provisions of this Agreement. In the event any such assignee assigns any rights it has under this Agreement, the other Party to this Agreement agrees to accept performance of this Agreement by the assignee, so long as the assignee is subject to the provisions of this Agreement.

15.0 **DEFAULT AND REMEDIES.**

15.1 **Default Defined.** The term “**default**” as used in this Agreement, is defined as follows: A default shall be deemed to have occurred under this Agreement if, in the case of a material breach of this Agreement by a Party, that Party fails to cure such material breach within thirty (30) days after delivery to it of written notice specifying such breach; provided, however, that if the breach is of a nature that cannot be cured within thirty (30) days, a default shall not have occurred, so long as the breaching Party has commenced to cure within said time period and thereafter diligently pursues such cure to completion.

15.2 **Remedies Upon Default.** Upon the occurrence of a default, the non-defaulting Party shall have all remedies available at law or at equity not otherwise excluded herein, including, but not limited to, termination of this Agreement, damages, specific performance, and/or, relief from further performance. Each such remedy shall be cumulative and not exclusive. Without limiting the foregoing, in the case of default by Whidbey, the PUD may, after providing written notice to Whidbey, operate, maintain, or repair the Whidbey System and/or the Point Roberts System to the extent necessary to maintain continuation of Communication Services to Customers and Whidbey Connectivity Services to Approved ISPs, reserving the cost as damages against Whidbey.

15.3 **No Termination of Connectivity Services.** Notwithstanding anything to the contrary in this Agreement, after payment of the IRU Fee to Whidbey, Whidbey may not terminate (i) the PUD’s right to use the IRU during the Agreement Term; or (ii) the Approved ISPs’ rights to use the Point Roberts System, so long as the Approved ISPs comply with the terms and conditions of their respective Whidbey ISP Agreements during the Agreement Term.

15.4 **PUD’s Cure Rights.** Notwithstanding any other provision of this Agreement, in the event Whidbey does not or is unable to perform the services in conformance with the terms of this Agreement, regardless of reason or Whidbey’s good faith attempts, the PUD may (but is not obligated), upon written notice to Whidbey reasonable under the circumstances (but without authorization from Whidbey), perform such services or work and/or take such action that it deems necessary. In such instances, the PUD may request Whidbey to pay the PUD an amount equal to the actual costs of services performed by the PUD. If the PUD requests payment, Whidbey will remit payment to the PUD within thirty (30) days from the date of PUD’s invoice

15.5 **Injunctive Relief.** The Parties acknowledge and agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms, and further agree that, due to the unique subject matter covered by this Agreement, each Party shall be entitled to specific performance of the

obligations hereunder and/or injunctive relief, in addition to any other right or legal remedy available to such Party.

16.0 MEDIATION.

16.1 **Pre-Litigation Mediation.** Prior to filing a lawsuit related to or arising out of this Agreement, the Parties shall engage in mediation utilizing a mutually agreeable mediator or, in the event the Parties cannot agree on a mediator, then one appointed by the AAA. Either Party can demand mediation by sending written notice to the other Party. Each Party shall pay its own attorneys' fees and costs incurred in such mediation. The Parties shall each pay one-half (1/2) of the mediator's fees.

17.0 COMPLIANCE WITH APPLICABLE LAW.

17.1 **Generally.** The Parties shall comply with all applicable laws, rules, government requirements and directives, Applicable Standards, and Authorizations relating to a Party's performance of its obligations, and enjoyment of rights conferred, under this Agreement.

17.2 **Compliance With Third-Party Grant Terms.** The Parties acknowledge that some or all of the funding for Whidbey's construction of the Point Roberts System has been received and accepted by Whidbey pursuant to the terms the Grant. Whidbey hereby agrees to timely, fully, and faithfully comply with all of the covenants, terms, and conditions of the Grant and Grant Agreement throughout the Agreement Term.

17.2.1 **Grant Cooperation.** During the Agreement Term, Whidbey shall provide any documents and/or information reasonably required for the PUD to comply with the terms and conditions of the Grant Agreement.

18.0 LIMITATIONS OF LIABILITY; INDEMNIFICATION.

18.1 **ONLY ACTUAL DAMAGES. NOTWITHSTANDING ANY PROVISION OF THIS AGREEMENT TO THE CONTRARY, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY OR ANY THIRD PARTY FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE, OR CONSEQUENTIAL COSTS, LIABILITIES, OR DAMAGES, WHETHER FORESEEABLE OR NOT, ARISING OUT OF OR IN CONNECTION WITH SUCH PARTY'S PERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT.**

18.2 **Mutual Indemnification.** To the extent permitted by law, each Party hereby agrees to defend and indemnify the other, and their respective managers, members, officers, commissioners, and employees, from and against, and assume liability for, any injury, loss, damage, or claim by any third party for personal injury or damage to tangible property (collectively, the "**Claims**"), to the extent and in proportion that such Claims arise from the negligent, grossly negligent, or willful act of the indemnifying Party, and/or its officers, employees, servants, affiliates, agents, contractors, licensees, invitees, or vendors.

18.3 **LIMITED WAIVER OF IMMUNITY UNDER WASHINGTON STATE INDUSTRIAL INSURANCE ACT, TITLE 51 RCW, AND OTHER SIMILAR INDUSTRIAL INSURANCE SCHEMES.** For purposes of the foregoing indemnification provision, and only to FIBER SYSTEM DESIGN, CONSTRUCTION, AND IRU AGREEMENT – 23

the extent of Claims against each other under such indemnification provision, each Party specifically waives any immunity it may be granted under the Washington State Industrial Insurance Act, Title 51 RCW, the United States Longshore and Harbor Workers Compensation Act, 33 USC §901-950, or any other similar workers' compensation schemes. The indemnification obligation under this Agreement shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable to or for any third party under workers' compensation acts, disability benefit acts, or other employee benefit acts. **THE FOREGOING PROVISION WAS SPECIFICALLY NEGOTIATED AND AGREED UPON BY THE PARTIES HERETO.**

19.0 INSURANCE.

19.1 Whidbey Insurance. Throughout the Agreement Term, Whidbey shall maintain insurance coverages of the types and in the minimum amounts set forth below at its expense, as applicable:

<u>Type of Insurance:</u>		<u>Limit:</u>
General Liability (including contractual liability) written on an occurrence basis	General Aggregate	\$2,000,000
	Prod./Comp. op. Agg.	\$2,000,000
	Personal & Adv. Injury	\$2,000,000
	Each Occurrence	\$2,000,000
Automobile Liability, including any auto, hired auto, and non-owned autos	Combined Single Limit	\$2,000,000
Excess Liability, Umbrella Form	Each Occurrence	\$2,000,000
	Aggregate	\$2,000,000

19.2 Whidbey Insurance: Additional Insured Status and Other Provisions. The insurance policy or policies providing the foregoing insurance coverages shall name the PUD as an additional insured by way of a policy endorsement. Whidbey shall provide to the PUD certificate(s) of insurance and, if requested by the PUD, a copy of any policy providing any portion of such required coverage. Receipt of such certificate or policy by the PUD does not constitute approval by the PUD of the terms of such policy. Furthermore, the policy of insurance required herein (or each such policy, if more than one (1)) shall (i) be written as a primary and non-contributory policy; (ii) expressly provide that such insurance may not be canceled with respect to the PUD except upon forty-five (45) days' prior written notice from the insurance company to the PUD; (iii) contain an express waiver of any right of subrogation by the insurance company against the PUD; (iv) expressly provide that the defense and indemnification of the PUD as an "additional insured" will not be affected by any act or omission by the PUD which might otherwise result in a forfeiture of said insurance; (v) contain a separation of insureds provision such that the policy applies separately to each insured that is subject of a claim or suit; and (vi) not contain a cross-claim, cross-suit, or other exclusion that eliminates coverage by one insured against another.

19.3 **PUD Insurance.** Throughout the Agreement Term , the PUD shall maintain insurance coverages of the types and in the minimum amounts set forth below at its expense, as applicable:

<u>Type of Insurance:</u>		<u>Limit:</u>
General Liability (including contractual liability) written on an occurrence basis	General Aggregate	\$2,000,000
	Prod./Comp. op. Agg.	\$2,000,000
	Personal & Adv. Injury	\$2,000,000
	Each Occurrence	\$2,000,000
Automobile Liability, including any auto, hired auto, and non-owned autos	Combined Single Limit	\$2,000,000
Excess Liability, Umbrella Form	Each Occurrence	\$2,000,000
	Aggregate	\$2,000,000

19.4 **PUD Insurance: Additional Insured Status and Other Provisions.** The insurance policy or policies providing the PUD insurance coverages required by Section 19.3, above, shall name Whidbey as an additional insured by way of a policy endorsement. The PUD shall provide Whidbey certificate(s) of insurance and, if requested by Whidbey, a copy of any policy providing any portion of such required coverage. Receipt of such certificate or policy by Whidbey does not constitute approval by Whidbey of the terms of such policy. Furthermore, the policy of insurance required herein (or each such policy, if more than one (1)) shall (i) be written as a primary and non-contributory policy; (ii) expressly provide that such insurance may not be materially changed, amended, or canceled with respect to Whidbey except upon forty-five (45) days' prior written notice from the insurance company to Whidbey; (iii) contain an express waiver of any right of subrogation by the insurance company against Whidbey; (iv) expressly provide that the defense and indemnification of Whidbey as an "additional insured" will not be affected by any act or omission of Whidbey which might otherwise result in a forfeiture of said insurance; (v) contain a separation of insureds provision such that the policy applies separately to each insured that is subject of a claim or suit; and (vi) not contain a cross-claim, cross-suit, or other exclusion that eliminates coverage by one insured against another.

19.5 **Casualty Loss.** Each Party agrees that neither Party, nor each Party's managers, members, shareholders, officers, commissioners, directors, employees, insurance carriers, or casualty policies, shall be responsible to the other Party for any property loss or damage done to the other Party's property, whether real, personal, or mixed, occasioned by reason of any fire, storm, or other casualty whatsoever, where such loss has arisen, directly or indirectly, in whole or in part, from this Agreement. It shall be each Party's sole responsibility to provide its own protection against casualty losses of whatsoever kind or nature, regardless of whether or not such loss is occasioned by the acts or omissions of the other Party, third party, or act of nature. In this regard, each Party hereby releases and discharges the other Party and such other Party's managers, members, shareholders, officers, commissioners, directors.

19.5.1 Whidbey's Obligation to Rebuild the Point Roberts System.

Notwithstanding the foregoing in Section 19.5, above, in the event of any casualty loss to the Point Roberts System for which Whidbey receives any insurance recovery or recovery from any other third party, and if the recovery or sum of the recoveries so received by Whidbey shall be sufficient to fund rebuilding of the Point Roberts System, Whidbey shall proceed expeditiously to

rebuild the Point Roberts System and shall diligently prosecute such rebuilding until the Point Roberts System shall be fully restored.

19.5.1.1 If the proceeds from the above-mentioned recovery or recoveries are insufficient to fully fund rebuilding of the Point Roberts System, then Whidbey shall expeditiously commence and diligently prosecute to completion the building of such portion or portions of the Point Roberts System as to which the recoveries so received by Whidbey shall be sufficient. The portion or portions of the Point Roberts System to be rebuilt shall be determined by Whidbey in consultation with the PUD.

19.5.2 Whidbey's Obligation to Rebuild the Whidbey System. Notwithstanding the foregoing in Section 19.5.1, above, in the event of any casualty loss to the Whidbey System which prevents Whidbey from providing the Whidbey Connectivity Services, Whidbey shall proceed expeditiously to rebuild the Whidbey System to the extent necessary to restore the Whidbey Connectivity Services to good working order and shall diligently prosecute such rebuilding until the Whidbey Connectivity Services are fully restored. If rebuilding the Whidbey System is commercially impracticable, Whidbey shall arrange and provide alternative connectivity services supporting the Point Roberts System's operation during the Agreement Term, to the reasonable satisfaction of the PUD.

20.0 TAXES AND GOVERNMENT IMPOSITIONS

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

20.2 **Minimization and Equitable Distribution of Impositions.** The Parties acknowledge and agree that it is their mutual objective and intent to minimize the aggregate Impositions payable with respect to the Point Roberts System.

20.3 **Payment of Impositions During the Agreement Term.** Beginning on the Effective Date, and continuing through expiration of the Agreement Term, Whidbey shall be responsible for, and shall timely pay, (i) all Impositions imposed on, based on, or otherwise measured by the gross receipts, gross income, net receipts, or net income received by or accrued to Whidbey with respect to its use of the Point Roberts System; (ii) all Impositions which have been separately assessed, allocated to, or imposed on the Point Roberts System; and (iii) all applicable Impositions for which Whidbey is responsible under any "**Cable Franchise Agreement**" in effect where "**Cable Services**," as defined in the Cable Franchise Agreement, are delivered to Whidbey Customers through the Point Roberts System. Beginning on the Effective Date, and continuing through expiration of the Agreement Term, the PUD shall

be responsible for, and shall timely pay, all Impositions imposed on, based on, or otherwise measured by the gross receipts, gross income, net receipts, or net income received by or accrued to the PUD with respect to their use of the IRU Fiber.

20.4 Right to Contest. Either Party shall have the right to contest, in good faith, any Imposition (including by non-payment of such Imposition). The Party contesting such Imposition shall be solely responsible for the payment of any out-of-pocket costs and expenses (including reasonable attorneys' fees) incurred in any such contest. Any refunds or credits resulting from a contest brought pursuant to this Section shall be divided between the PUD and Whidbey in the same proportion as originally assessed.

20.5 Preparation of Returns and Reports. Whidbey and the PUD agree to cooperate fully with one another in the preparation of any returns or reports relating to the Impositions.

21.0 REPRESENTATIONS, WARRANTIES, AND ACKNOWLEDGEMENTS

21.1 Representations and Warranties of Whidbey. Whidbey represents and warrants that, for all purposes, including, without limitation, for purposes of Section 541(d) of the United States Bankruptcy Code:

- a. Whidbey is duly organized, valid existing, and in good standing under the laws of the State of Washington, and is registered to do business in the State of Washington.
- b. This Agreement is a valid and legally binding obligation of Whidbey, and is enforceable against Whidbey in accordance with its terms, except when enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws relating to the enforcement of creditors rights, generally and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).
- c. Neither the execution and delivery of this Agreement, the grant of the IRU, nor the provision of Whidbey Connectivity Services will violate, conflict with, or result in a breach of the terms, conditions, or provisions of, or constitute a default under, (i) Whidbey's organizational documents; (ii) any contract, agreement, mortgage, deed of trust, or other instrument or obligation to which either Whidbey is a party or by which Whidbey is bound; or (iii) any applicable law or regulation or any order, decree, writ, or injunction of any court or governmental body.
- d. No consent or other approval of or from any governmental entity or agency, or any other person or entity, is necessary in connection with the execution, delivery, or performance of this Agreement.
- e. The undersigned has full authority to execute this Agreement on behalf of Whidbey.
- f. Whidbey has the financial, technical, and management expertise and experience to fully perform all of Whidbey's obligations under this Agreement.

21.2 Representations and Warranties of the PUD.

a. The PUD is a duly organized, validly existing, and in good standing Washington municipal corporation organized pursuant to Title 53 RCW.

b. This Agreement is a valid and legally binding obligation of the PUD, and is enforceable against the PUD in accordance with its terms, except when enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws relating to the enforcement of creditors rights, generally and by general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

c. Neither the execution and delivery of this Agreement nor the acceptance of the Point Roberts System IRU will violate, conflict with, or result in a breach of the terms, conditions, or provisions of, or constitute a default under, (i) any contract, agreement, mortgage, deed of trust, or other instrument or obligation to which either the PUD is a party or by which PUD is bound; or (ii) any applicable law or regulation or any order, decree, writ, or injunction of any court or governmental body.

d. No consent or other approval of or from any governmental entity or agency, or any other person or entity, is necessary in connection with the execution, delivery, or performance of this Agreement.

e. The undersigned has full authority to execute this Agreement on behalf of the PUD.

22.0 FORCE MAJEURE.

22.1 Neither Party shall be in default under this Agreement if, and to the extent that, any failure or delay in such Party's performance of one (1) or more of its obligations hereunder is caused by any of the following conditions, and such Party's performance of such obligation or obligations shall be excused and extended for and during the period of any such delay: act of God; fire; wind; flood; fiber cut, cable cut, or other material failures, shortages, or unavailability, and then, only during such periods as may be required to reasonably repair the fiber cut, cable cut, or other material failures, shortages, or unavailability, or other delay in delivery not resulting from the responsible Party's failure; failure of third-party power or system failures; lack of or delay in transportation not resulting from the responsible Party's failure; government codes, ordinances, laws, rules, regulations, or restrictions; war or civil disorder; strikes or other labor disputes; failure of a third party to grant or recognize a PUD or Whidbey Underlying Right; inability of the PUD to obtain access to the Whidbey System or the Point Roberts System not resulting from Whidbey's failure; or any other cause beyond the reasonable control of such Party.

23.0 NOTICES.

25.1 All notices and other communications required or permitted under this Agreement shall be in writing and shall be given (i) via United States first class mail, postage prepaid; (ii) via registered or certified mail with a return receipt requested; (iii) via electronic mail; or (iv) via

hand delivery (including by means of a professional messenger service or overnight mail), and shall be addressed as follows:

- a. All notices and other communications shall be given to Whidbey at:

ATTN: _____

E-mail: _____

- b. All notices and other communications shall be given to PUD at:

ATTN: Public Utility District No. 1 of Whatcom County
1705 Trig Rd.
Ferndale, WA 98248
E-mail: andrewentrikin@pudwhatcom.org

25.2 Any such notice or other communication shall be deemed to be effective when actually received or refused. Either Party may, by similar notice given, change the address to which future notices or other communications shall be sent.

24.0 MISCELLANEOUS TERMS

24.1 **Binding Effect.** This Agreement, and each of the Parties' respective rights and obligations under this Agreement, shall be binding on and inure to the benefit of the Parties hereto, and each of their respective permitted successors and assigns.

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

24.3 **Governing Law, Jurisdiction, and Venue.** This Agreement, and all disputes or claims arising therefrom, shall be governed by and construed in accordance with the laws of the State of Washington. Exclusive and sole jurisdiction and venue shall be in the Washington State Superior Court in Whatcom County, Washington. There shall be no right of removal to any federal court, which right both Parties expressly and irrevocably waive. The Parties expressly and irrevocably waive the right to trial by jury.

24.4 **Rules of Construction.** The captions or headings in this Agreement are strictly for convenience only, and shall not be considered in interpreting this Agreement or as amplifying or limiting any of its content. Words in this Agreement which import the singular connotation shall be interpreted as plural, and words which import the plural connotation shall be interpreted as singular, as the identity of the parties or objects referred to may require.

- a. Unless expressly defined herein, words having well-known technical or trade meanings shall be so construed. All listing of items shall not be taken to be exclusive, but

shall include other items, whether similar or dissimilar to those listed, as the context reasonably requires.

b. Except as set forth to the contrary herein, any right or remedy of the PUD or Whidbey shall be cumulative and without prejudice to any other right or remedy, whether contained herein or not.

c. Except as specifically set forth herein, nothing in this Agreement is intended to provide any legal rights to anyone not an executing Party of this Agreement.

d. This Agreement has been fully negotiated and jointly drafted between and by the Parties.

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

24.5 Entire Agreement. This Agreement constitutes the entire and final agreement and understanding between the Parties with respect to the subject matter hereof, and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits referred to herein are integral parts hereof, and are hereby made a part of this Agreement. To the extent that any of the provisions of any Exhibit hereto are inconsistent with the express terms of this Agreement, the terms of the Exhibit shall prevail. This Agreement may only be modified or supplemented by an instrument in writing, executed by each Party and delivered to the Party relying on the writing.

24.6 No Personal Liability. Each action or claim against any Party arising under or relating to this Agreement shall be made only against such Party as a corporation, and any liability relating thereto shall be enforceable only against the corporate assets of such Party. No Party shall seek to pierce the corporate veil or otherwise seek to impose any liability relating to or arising from this Agreement against any shareholder, employee, officer, or director of the other Party. Each of such persons is an intended beneficiary of the mutual promises set forth in this Section and shall be entitled to enforce the obligations of this Section.

24.7 Relationship of the Parties. The relationship between the PUD and Whidbey shall not be that of partners, agents, or joint venturers for one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to, federal income tax purposes. The PUD and Whidbey, in performing any of their obligations hereunder, shall be independent contractors or independent parties, and shall discharge their contractual obligations at their own risk subject, however, to the terms and conditions hereof.

24.8 Change In Law. If changes in applicable laws, regulations, rules, or orders materially affect either Party's ability to lawfully fulfill any of its obligations under this Agreement, the Parties agree to negotiate and execute appropriate changes to this Agreement. If changes

in applicable laws, regulations, rules, or orders make either Party's continued fulfillment of its obligations under this Agreement commercially impracticable, either Party may propose an appropriate amendment to this Agreement.

24.9 **Severability.** If any term, covenant, or condition contained herein is, to any extent, held as invalid, illegal, or unenforceable in any respect under the laws governing this Agreement, the remainder of this Agreement shall not be affected thereby, and each term, covenant, or condition of this Agreement shall be valid, legal, and enforceable to the fullest extent permitted by law.

24.10 **Survival.** All obligations of the Parties to this Agreement shall not cease upon the termination of this Agreement, and shall continue as obligations until fully performed. All clauses of this Agreement which require performance beyond the termination date of this Agreement shall survive the termination date of this Agreement.

24.11 **Attorneys' Fees.** The substantially prevailing Party in any action to enforce any term or condition of this Agreement shall be entitled to an award of their reasonable costs and attorneys' fees.

24.12 **Counterparts.** This Agreement may be executed in one (1) or more counterparts, all of which taken together shall constitute one (1) and the same instrument. The counterparts of this Agreement may be executed and delivered by facsimile, or other electronic signature, by any of the Parties to any other Party, and the receiving Party may rely on the receipt of such document, so executed and delivered by facsimile, or other electronic means, as if the original had been received.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

THIS AGREEMENT CONTAINS INDEMNIFICATIONS, RELEASES, AND A LIMITED WAIVER OF IMMUNITY UNDER THE WASHINGTON STATE INDUSTRIAL INSURANCE ACT, TITLE 51 RCW, OR ANY OTHER SIMILAR WORKERS' COMPENSATION SCHEMES.

PUD:

WHIDBEY:

**PUBLIC UTILITY DISTRICT
NO. 1 OF WHATCOM COUNTY**

WHIDBEY TELEPHONE COMPANY

By: _____
Title: _____

By: _____
Title: _____

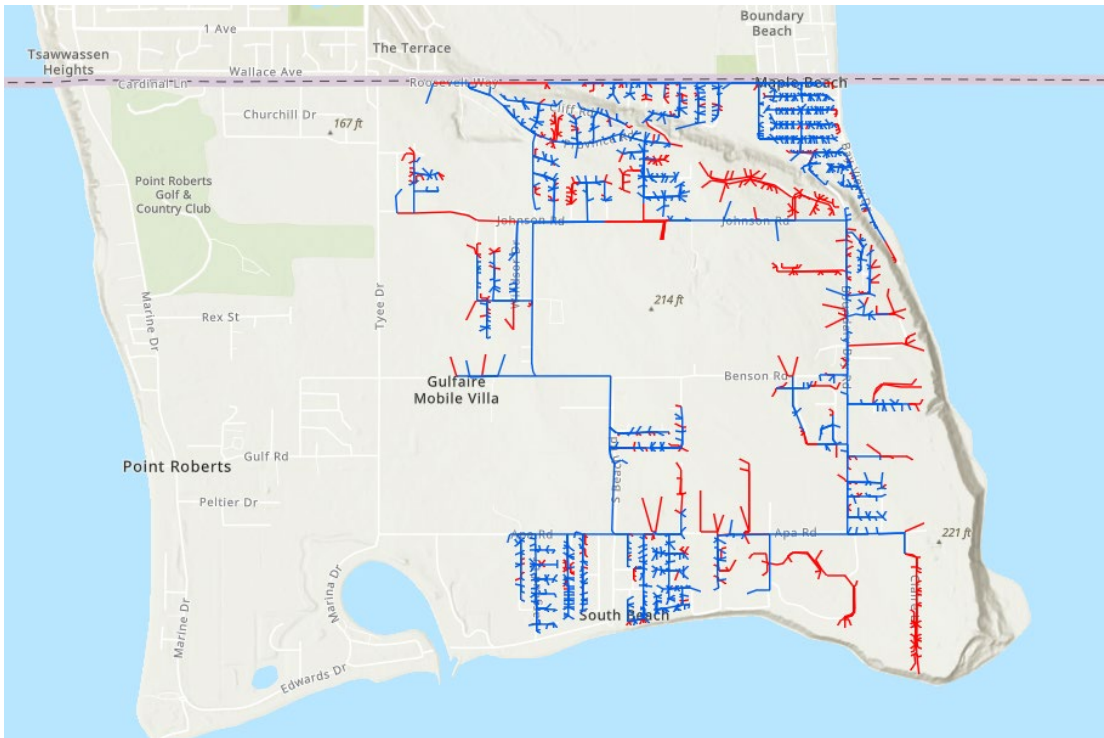
**EXHIBIT A
GRANT AGREEMENT**

EXHIBIT B
POINT ROBERTS SYSTEM INITIAL DESCRIPTION
(Subject to Final Design)

Whidbey is building an open-access dark fiber-to-the-premises network in the Point Roberts, WA area that includes, but is not limited to, the following main streets: Portions of Tye Dr.; Johnson Rd.; Benson Rd.; Apa Rd.; and Boundary Bay Rd. This project is a last-mile project to serve one thousand (1,000) locations. The total project is roughly one hundred eighteen thousand eight hundred ninety feet (118,890 ft) of aerial fiber to the premises. This network will provide broadband to our local businesses and community members who currently are unserved or underserved by the current infrastructure or lack thereof.

Point Roberts System





Green – Existing conduit.
Blue – Aerial Fiber Optic Cable.

EXHIBIT C WHIDBEY SYSTEM DESCRIPTION

Whidbey provides Internet and related services to customers and businesses throughout Point Roberts utilizing Fiber and Coax technologies with a focus on rural residential access. Whidbey will provide a demarcation point to interconnect with the Point Roberts System to facilitate the needed connectivity to support both (1) internet access for residential and business users; and (2) after expiration of the Exclusive Use Period, open connectivity for Approved ISPs.

Whidbey's Point Roberts Existing System

- Red – Project Area Outline
- Blue – Existing Whidbey Network
- Yellow – Whidbey Aerial Tie in Splice Case

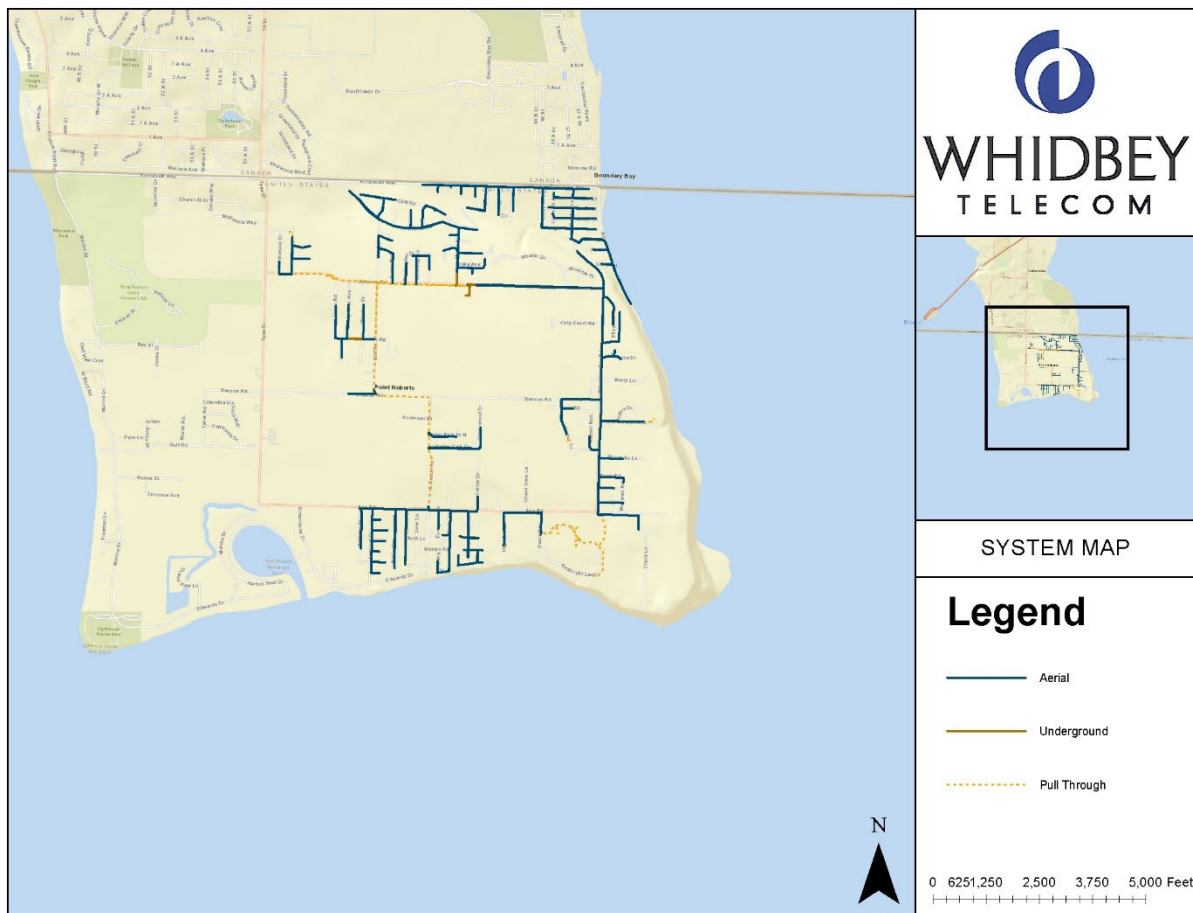


EXHIBIT D
OPERATIONS AND MAINTENANCE SPECIFICATIONS AND PROCEDURES

1. DEFINED TERMS

1.1 “**Routine Maintenance**” is all preventive maintenance activities, upgrades, and repairs, including, but not limited to, those activities outlined in this **Exhibit D**.

1.2 “**Non-Routine Maintenance**” is all efforts and activities in response to an emergency circumstance that requires restoration.

2. GENERAL

2.1. Whidbey’s personnel will dispatch maintenance and repair personnel along the Point Roberts System to handle and repair problems detected by Whidbey, the PUD, an Approved ISP, a Customer, or otherwise.

2.2. Whidbey’s maintenance employees will be available for dispatch twenty-four (24) hours a day, seven (7) days a week. Whidbey will dispatch its first maintenance employee to a site requiring Non-Routine Maintenance as soon as practicable from the time an emergency alarm is identified by Whidbey’s NOC or an emergency notification is received by the PUD, an Approved ISP, a Customer, or otherwise, whichever occurs first. In the case of a catastrophic event requiring Non-Routine Maintenance to multiple sites, Whidbey will dispatch maintenance employees on an emergency basis with response times commensurate with the magnitude of the event and subject to commercial impracticability.

2.3. The PUD will utilize the list of escalation contacts (“**Operations Escalation List**”) provided by Whidbey to report and seek immediate initial redress of exceptions noted in the performance of Whidbey in meeting maintenance service objectives. Whidbey may update the Operations Escalation List from time-to-time.

2.4. Whidbey will take workmanlike care to prevent impairment to the signal continuity and performance of the Point Roberts System. Whidbey shall notify the PUD of the precautions to be taken by Whidbey. In addition, Whidbey will reasonably cooperate with the PUD in sharing information and analyzing any disturbances regarding the Point Roberts System.

2.5. Routine Maintenance that is reasonably expected to produce any signal discontinuity must be coordinated between the Parties and performed in accordance with Scheduled Maintenance Procedures. “**Scheduled Maintenance Procedures**” or “**SMP**” means a pre-arranged period of time reserved for performing certain work on, to, or for the Whidbey System or the Point Roberts System that may impact a Customer’s telecommunications services. Unless otherwise agreed by the PUD, SMP will be completed after midnight and before 6:00 a.m., local time. Major work such as fiber rolls and hot cuts will also be scheduled utilizing SMP.

2.6. Whidbey will maintain the Point Roberts System in a manner that permits normal operation of the equipment associated with the Point Roberts System. Such maintenance

includes, but is not limited to, landscaping, weed control, fence repair, installation and operation of smoke detectors, air conditioning, power, and trash removal.

3. POINT ROBERTS SYSTEM

3.1. Whidbey will maintain the Point Roberts System in good and operable condition, and shall repair the Point Roberts System in a workmanlike manner. Whidbey will maintain the Point Roberts System in a manner that permits normal operation of the Point Roberts System.

3.2. Whidbey will subscribe to the Washington State Utility Notification Center's Call Before You Dig service and ensure the Point Roberts System is registered. Whidbey will perform all required locates. Whidbey will maintain all signposts along the Point Roberts System with the number of the "Call Before You Dig" organization.

3.3. Whidbey will perform appropriate Routine Maintenance on the Point Roberts System in accordance with Whidbey's then-current preventative maintenance procedures. Whidbey's maintenance procedures will not substantially deviate from standard industry practice.

4. RESTORATION OF IRU FIBER CUT

4.1. When restoring cut IRU Fiber, the Parties agree to work together to restore all services as quickly as possible. Whidbey, immediately upon arriving on the site of the cut, shall determine the best course of action to be taken to restore the IRU Fiber and shall begin restoration efforts.

4.2. It will be the responsibility of Whidbey and the PUD to report to one another any known environmental hazards that would restrict or jeopardize any maintenance work activities in areas of operations.

4.3. Upon notification of interruption of IRU Fiber service or other information indicating a potential IRU Fiber cut, Whidbey will mobilize technicians to achieve the necessary repairs or restorations, including, but without limitation, using reasonable efforts to have maintenance personnel at the affected site within eight (8) hours after receipt of such notice and such repair completed within twenty-four (24) hours from notice with the required restoration material and equipment.

4.4. The requirement for detection of the fault location is "as exact as possible," utilizing test records, fiber documentation, GPS coordinates, and OTDR test results of the affected portions of the Point Roberts System.

4.5. Whidbey's employees or its designated contractor will be responsible for correcting or repairing IRU Fiber discontinuity or damage, including, but not limited to, the emergency repair of the Point Roberts System. Whidbey will repair the service-affecting discontinuity as soon as possible after learning of the discontinuity or the service-affecting situation.

4.6. Whidbey will maintain sufficient capability to teleconference with the PUD during an emergency repair in order to provide continuous communication. With respect to restoration of open fibers on fiber strands not immediately required for service, the repair will be scheduled for the next available SMP.

5. OPERATIONS ESCALATION LIST

Whidbey Telecom Tech Support

E-mail: _____
Phone: 360-321-8324

Escalation Contact – First Level

E-mail: _____
Phone: _____

Escalation Contacts – Second Level

Commercial NOC Manager,

E-mail: _____
Phone: _____

Commercial NOC Manager,

E-mail: _____
Phone: _____

Escalation Contact – Third Level

Commercial NOC SR Manager,

E-mail: _____
Phone: _____

Escalation Contact – Fourth Level

E-mail: _____
Phone: _____

EXHIBIT E
IRU COMMENCEMENT DATE

See Section 5.3 for details.

**EXHIBIT F
FORMS**

Quarterly Progress Report

Quarterly Progress Report

(Due: _____, if no A19-Invoices have been submitted during this time.)

Project Information	Reporting Period
WSBO Contract Number: Applicant Name: Completed by: Phone: Date of Submittal:	<input type="checkbox"/> July 1 – September 30 <input type="checkbox"/> October 1 – December 31 <input type="checkbox"/> January 1 – March 31 <input type="checkbox"/> April 1 – June 30 Year: _____

1. Review the contract scope of work, and describe the progress made to date and percentage of completion.
2. Describe any significant problem(s) or unforeseen costs that have or will affect the project's timeline or successful completion of the project, (i.e., any delays or changes to the project as described in the contract scope of work).
3. Are any contract amendments needed? Yes No
If yes, please explain:
4. Please provide copies of any press releases or news articles related to the project that were released or published during this reporting period.
5. Provide notice of ground breakings, ribbon cutting ceremonies, etc.

A-19 for Reimbursement

Public Utility District No. 1 of Whatcom County – Point Roberts, WA

						WSBO	Local Match
Date of Invoice	Inv #	Vendor	Description	Amount		Construction	Design-Engineering
					Budget	\$3,375,000	350,000
			Sub-Total A19 #1	\$0.00	\$0.00	\$0.00	\$0.00
			Balance			\$3,375,000	\$50,000

Narrative to Support Reimbursement Request(s):

- Project description
- Project locations(s)
- Project start and end date
- Project status
- Project expenditure
- Number of households, businesses, and anchor institutions served
- Location of communities to be served
- Description of how equity and community engagement activities informed project selection and design

Project Completion Report Form

See Washington State Broadband Office Infrastructure Acceleration Grants Handbook 21-26, Revised April 3, 2025, Attachment 4-E.

EXHIBIT G
WHIDBEY REPRESENTATIONS REGARDING FEDERAL CONTRACTING
PROVISIONS APPLICABLE TO THE STATE AND LOCAL FISCAL RECOVERY
AND/OR CAPITAL PROJECTS FUNDS

Contracts for more than the simplified acquisition threshold, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

Whidbey Representation: This Agreement addresses remedies for breach and appropriate penalties.

All contracts in excess of Ten Thousand Dollars (\$10,000.00) must address termination for cause and for convenience by the non-Federal entity, including the manner by which it will be effected and the basis for settlement.

Whidbey Representation: This Agreement addresses termination for cause and for convenience.

Compliance with Equal Employment Opportunity under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

Whidbey Representation: Whidbey complies with applicable federal and state equal employment opportunity requirements and incorporates the equal opportunity clause by reference herein.

Compliance with Davis-Bacon Act, as amended (40 U.S.C. 3141-3148).

Whidbey Representation: Whidbey complies with all federal and state laws and regulations regarding prevailing wages, payment of employees, placement of notifications, and other requirements in accordance with the Davis-Bacon Act (40 U.S.C. 3141-3144), and 3146-3148), as supplemented by Department of Labor regulations (29 CFR Part 5), each of which is incorporated herein by reference. Whidbey also complies with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3), each of which is incorporated herein by reference.

Compliance with Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708)

Whidbey Representation: Whidbey complies with all applicable provisions of 40 U.S.C. 3701-3708.

Compliance with Rights to Inventions Made Under a Contract or Agreement (agreements meeting definition under 37 CFR § 401.2 (a) and subrecipient wants to contract a small business firm or nonprofit organization.

Whidbey Representation: Not applicable to Whidbey services provided under this Agreement.

Compliance with the Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended.

Whidbey Representation: Whidbey complies with all applicable standards, orders, or regulations specified in 42 U.S.C. 7401-7671q and 33 U.S.C. 1251-1387.

Compliance with Debarment and Suspension requirements from Executive Orders 12549 and 12689.

Whidbey Representation: Whidbey has not been barred, suspended, or otherwise excluded by any federal agency, nor has it been declared ineligible under any other statutory or regulatory authority.

Compliance with Byrd Anti-Lobbying Amendment (31 U.S.C. 1352).

Whidbey Representation: Whidbey has not used and will not use federal-appropriated funds to conduct lobbying activities, nor has it used non-federal funds to lobby for any federal award.

Compliance with §200.323 Procurement of recovered materials.

Whidbey Representation: Whidbey complies with all applicable requirements of 2 CFR §200.323.

Compliance with §200.216 Prohibition on certain telecommunications and video surveillance services or equipment, Public Law 115-232, section 889 and §200.471.

Whidbey Representation: Whidbey complies with all applicable provisions of 2 CFR §200.216, Public Law 115-232, section 889 and §200.471.

Compliance with §200.322 Domestic preferences for procurements.

Whidbey Representation: Whidbey complies with all applicable requirements of 2 CFR §200.322.

EXHIBIT F
REQUIRED FEDERAL STANDARD PROVISIONS

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Under Title VI of the Civil Rights Act of 1964, no person shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

ACCESS TO RECORDS CLAUSE

The PUD, the Washington State Department of Commerce (“COMMERCE”), and other authorized representatives of the state and federal governments, shall have access to any books, documents, papers, and records of Whidbey which are directly pertinent to the contract for the purposes of making audit, examination, excerpts, and transcriptions.

Whidbey agrees to maintain such records and follow such procedures as may be required under the state’s CDBG Program and any such procedures as the PUD or COMMERCE may prescribe. In general, such records will include information pertaining to the contract, obligations and unobligated balances, assets and liabilities, outlays, equal opportunity, labor standards (as appropriate), and performance.

All such records, and all other records pertinent to this Agreement and work undertaken under this Agreement, shall be retained by Whidbey for a period of three (3) years after final audit of the city/town/county’s CDBG project, unless a longer period is required to resolve audit findings or litigation. In such cases, the city/town/county shall request a longer period of record retention.

SECTION 109 OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974, AS AMENDED

No person in the United States shall, on the grounds of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded, in whole or in part, with funds made available under this Title.

PUBLIC LAW 101-336, AMERICANS WITH DISABILITIES ACT OF 1990

Subject to the provisions of this Title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

AGE DISCRIMINATION ACT OF 1975, AS AMENDED

No person shall be excluded from participation, denied program benefits, or subjected to discrimination on the basis of age under any program or activity receiving federal funding assistance. (42 U.S.C. 610 et. seq.)

SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED

No otherwise qualified individual shall, solely by reason of their handicap, be excluded from participation (including employment), denied program benefits, or subjected to discrimination under any program or activity receiving federal funds. (29 U.S.C. 794)

CONFLICT OF INTEREST PROVISION

Interest of Whidbey and Employees:

Whidbey covenants that it presently has no interest and shall not acquire interest, direct or indirect, in the study area or any parcels therein, or any other interest which would conflict in any manner or degree with the performance of its services hereunder. Whidbey further covenants that in the performance of this Agreement, no person having such interest shall be employed.

SECTION 3 OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1968 COMPLIANCE IN THE PROVISION OF TRAINING, EMPLOYMENT AND BUSINESS OPPORTUNITIES CLAUSE

(Applies to Contracts over Two Hundred Thousand Dollars (\$200,000.00))

- (a) The work to be performed under this Agreement is on a project assisted under a program providing direct federal financial assistance from the Department of Housing and Urban Development and is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u. Section 3 requires that to the greatest extent feasible, opportunities for training and employment be given to lower-income residents of the project area and contracts for work in connection with the project be awarded to business concerns, which are located in, or owned in substantial part by persons residing in, the area of the project.
- (b) The Parties to this Agreement will comply with the provisions of said Section 3 and the regulations issued pursuant thereto by the Secretary of the Department of Housing and Urban Development set forth in 24 CFR 75, and all applicable rules and orders of the Department of Housing and Urban Development issued thereunder prior to the execution of this Agreement. The Parties to this Agreement certify and agree that they are under no contractual or other disability, which would prevent them from complying with these provisions.
- (c) Whidbey will send to each labor organization or representative of workers with which it has a collective bargaining agreement or other contract or understanding, if any, a notice advising the said labor organization or worker's representative of its commitments under this Section 3 clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment or training.
- (d) Whidbey will include this Section 3 clause in every subcontract for work in connection with the project and will, at the direction of the applicant for, or recipient of federal financial assistance, take appropriate action pursuant to the subcontract upon a finding that the subcontractor is in violation of regulations issued by the Secretary of the Department of Housing and Urban Development, 24 CFR Part 75. Whidbey will not subcontract with any subcontractor where it has notice or knowledge that the latter has been found in

violation of regulations under 24 CFR Part 75 and will not let any subcontract unless the subcontractor has first provided it with a preliminary statement of ability to comply with the requirements of these regulations.

- (e) Compliance with the provisions of Section 3, the regulations set forth in 24 CFR Part 75, and all applicable rules and orders of the Department of Housing and Urban Development issued hereunder prior to the execution of the contract, shall be a condition of the federal financial assistance provided to the project and shall be binding upon the applicant or recipient for such assistance, and its successors and assigns. Failure to fulfill these requirements shall subject the applicant or recipient, its consultants and subcontractors, and its successors and assigns to those sanctions specified by the grant or loan agreement or contract through which federal assistance is provided, and to such sanctions as are specified by 24 CFR Part 75.

Action Memo

To: Commissioners Arnett, Deshmane, and Ury
From: Chris Heimgartner, General Manager
Date: February 24, 2026
Re: Pacifica Law Group Engagement letter

Requested Actions:

AUTHORIZE THE GENERAL MANAGER TO SIGN AN ENGAGEMENT LETTER WITH PACIFICA LAW GROUP TO SERVE AS THE PUD'S BOND COUNSEL

Background:

The PUD uses a separate law firm that specializes in municipal bonds outside of CSD Attorneys at Law. For over 20 years, that firm has been K&L Gates, and specifically Cynthia Weed. She retired at the end of 2025 and K&L Gates announced they were exiting the practice. In speaking with CSD and our financial advisor, Pacifica Law Group was recommended by both. They also served as counsel for the underwriter during the 2025 bond issue and therefore are familiar with the PUD.

Statement from Pacifica:

“We formed Pacifica almost 15 years ago specifically to serve public entities in the Pacific Northwest, and are proud to have built a strong bond counsel firm serving PUDs, city public power and other municipalities. We have represented Washington public utility districts and city electric and other utility issuers over the entire span of our careers, while at our prior firm (we were former partners at K&L Gates, the successor to Preston Gates & Ellis) and now at Pacifica. Public power is a core practice area of our municipal finance practice, and we are proud to serve as bond counsel to Grant PUD, Douglas PUD, Cowlitz PUD, Klickitat PUD, Tacoma Power (Department of Public Utilities) and others. We have significant experience with all varieties of revenue bonds and general obligation bonds, and the nuances of Washington law as it applies to PUDs.”

Fiscal Impact:

Legal expenses are included in the 2026 budget

Recommended Actions:

AUTHORIZE THE GENERAL MANAGER TO SIGN AN ENGAGEMENT LETTER WITH PACIFICA LAW GROUP TO SERVE AS THE PUD'S BOND COUNSEL

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY

P.O. Box 2308 | 1705 Trigg Road
Ferndale, WA 98248-9383
(360) 384-4288
www.pudwhatcom.org



Memo

To: Commissioners Arnett, Deshmane, Ury
From: Garrett Love-Smith, Engineering Manager
Date: February 24, 2026

Re: Approve Standard Professional Consulting Services Agreement with Trace3

Requested Action – APPROVE STANDARD PROFESSIONAL CONSULTING SERVICES AGREEMENT WITH TRACE3 AND AUTHORIZE THE GENERAL MANAGER TO EXECUTE THE AGREEMENT

Background – As a public entity providing utility services, Whatcom PUD, like other public entities, may be subject to many types of cyber security attacks or efforts to hack into its digital networks, both administrative and utility systems related. In an ongoing effort to attempt to stay one step ahead of potential bad actors, the PUD has and will continue to seek and retain qualified consultants to assist staff in identifying vulnerabilities, developing policies and procedures, and deploying appropriate technologies necessary to maintain a high level of cyber security awareness and protection. By necessity, this will be a continuous ongoing effort.

Given the context provided above, staff recommends that Whatcom PUD enter into an agreement with TRACE3 for the provision of cyber security related services. Staff recommends executing a Standard Agreement for Professional Consulting Services (“Agreement”) with TRACE3 (“Consultant”). The term of the Agreement would be through December 31, 2027

The Agreement, if approved, has no associated budget. Work to be assigned to the Consultant and the associated cost for the services to be performed will be through the use of work orders approved by Whatcom PUD’s General Manager or Commission pursuant to PUD Policy. Once a work order is approved, it will be attached to and incorporated into the Agreement as “Exhibit A”. Each new work order approved thereafter will be an amendment to Exhibit A and the underlying Agreement.

Under the Agreement, the Consultant’s general scope of services will include the performance of tasks focused on maintaining and improving the cybersecurity of Whatcom PUD’s systems related to its electric and water operations and administrative services. Also, the Consultant will address needs of the PUD with regards to IT functions.

Fiscal Impact – Approval of the Agreement with TRACE3 will have no fiscal impact on the PUD’s 2026 Budget as the Agreement document has no associated budget.

Recommended Action – APPROVE STANDARD PROFESSIONAL CONSULTING SERVICES AGREEMENT WITH TRACE3 AND AUTHORIZE THE GENERAL MANAGER TO EXECUTE THE AGREEMENT

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY

P.O. Box 2308 | 1705 Trigg Road

Ferndale, WA 98248-9383

(360) 384-4288

www.pudwhatcom.org

Commissioners: Jaime Arnett, Atul Deshmane, Eddy Ury Chris Heimgartner, General Manager

**STANDARD AGREEMENT
FOR PROFESSIONAL CONSULTING SERVICES**

THIS AGREEMENT (“Agreement”) is made and entered into this ____ day of March 2026 by and between the **PUBLIC UTILITY DISTRICT NO. 1 of WHATCOM COUNTY**, 1705 Trigg Road Ferndale, WA 98248, hereinafter called the "Whatcom PUD" and TRACE3, having an address of 7505 Irvine Center Dr, Suite 100, Irvine, CA 92618, hereinafter called "Consultant," for a project generally described as:

Consultant’s general scope of services will include the performance of tasks focused on maintaining and improving the cybersecurity of Whatcom PUD’s systems related to its electric and water operations and administrative services. Also, consultant will address needs of the PUD with regards to IT functions.

WHEREAS, Whatcom PUD wishes to obtain technical consulting services related to cybersecurity for its electric and water utilities and administrative services, including IT; and

WHEREAS, Consultant has expertise in providing such services and desires to perform such services for the Whatcom PUD; and

WHEREAS, the selection of the consultants, including 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, 2027**, 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.** Consultant 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 subconsultants 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: Chris Heimgartner, General Manager
Public Utility District No. 1 of Whatcom County
P.O. Box 2308
1705 Trigg Road
Ferndale, WA 98248

Consultant: TRACE3
7505 Irvine Center Dr Suite 100
Irvine, CA 92618

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:

TRACE3
By: _____
Title: _____
Firm's EIN: _____

Date signed: _____

Action Memo

To: Commissioners Arnett, Deshmane, and Ury

From: Stephanie Hooper, Accountant I

Date: February 24, 2026

Re: Approve Resolution No. 894 Authorizing the Cancellation of Warrants No. 01269670 & No. 01271405 And Reissuance of Warrant No. 01271405 to HDR Engineering Inc.

Requested Action: APPROVE RESOLUTION NO. 894 AUTHORIZING THE CANCELLATION OF WARRANTS NO. 01269670 & NO. 01271405 AND REISSUANCE OF WARRANT NO. 01271405 TO HDR ENGINEERING INC.

Background: Warrant 01269670 was issued on December 30th, 2025 in the amount of \$22,880.89 and Warrant No. 01271405 was issued on February 3rd, 2026 in the amount of \$6,340.47. The warrants were issued to HDR Engineering Inc. to cover the cost of engineering work. Neither of the warrants were received by HDR Engineering Inc. due to the fact the HDR had changed addresses and had not notified the PUD or the County. The finance department requests the commission's cancellation of both warrants with only Warrant No. 01271405 needing to be reissued as Warrant No. 01269670 has already been reissued. Per commission approval of this resolution the district will be asking the county to cancel and disregard the both warrants and reissued Warrant No. 01271405.

Fiscal Impact: No fiscal impact.

Recommended Action: APPROVE RESOLUTION NO. 894 AUTHORIZING THE CANCELLATION OF WARRANTS NO. 01269670 & NO. 01271405 AND REISSUANCE OF WARRANT NO. 01271405 TO HDR ENGINEERING INC.

RESOLUTION NO. 894

**RESOLUTION BY THE BOARD OF COMMISSIONERS
OF PUBLIC UTILITY DISTRICT NO.1 OF WHATCOM COUNTY (“DISTRICT”)
AUTHORIZING THE CANCELLATION OF WARRANTS NO. 01269670 & NO.
01271405 AND REISSUANCE OF WARRANT NO. 01271405**

WHEREAS, the warrants referenced in Exhibit A (the “Warrants”) were issued to pay invoices from HDR Engineering Inc.

WHEREAS, following the Commission’s authorization of the issuance of the Warrants, the County’s Administrative Services Department (“County”) printed Warrant No. 01269670 on December 30, 2025 and Warrant No. 01271405 on February 3, 2026; however, the warrants were not received by HDR Engineering Inc. due to a change in address by HDR Engineering Inc. that was not reported to the County nor to the District.

WHEREAS, the County has provided Warrant No. 01269670 on December 30, 2025 and Warrant No. 01271405 on February 3, 2026, and the Warrants will not be tendered to HDR Engineering Inc., the District does now wish to cancel the Warrants and reissued Warrant No. 01271405, as provided by law.

NOW THEREFORE BE IT RESOLVED that the district hereby cancels the warrants listed in Exhibit A and grants permission to reissue Warrant No. 01271405.

ADOPTED by the Commission of Public Utility District No.1 of Whatcom County at its regular meeting held on the 24th day of February, 2026.

**PUBLIC UTILITY DISTRICT NO.1
Of WHATCOM COUNTY**

Eddy Ury, President/Commissioner

Atul Deshmane, Vice President/Commissioner

Jaime Arnett, Commissioner

**Resolution No. 894 Exhibit A
Cancellation of Warrant**

Warrant No.	Warrant Date	Vendor	Amount
01269670	December 30, 2025	HDR Engineering Inc.	(\$22,880.89)
01271405	February 3, 2026	HDR Engineering Inc.	(\$6,340.47)