

## Indefeasible Right to Use Agreement (Cover Page)

This Indefeasible Right to Use Agreement (including this Cover Page, the General Terms, and all Exhibits collectively, this "Agreement") is signed by duly authorized representatives of the parties and effective as of the last date signed on this cover page ("Effective Date"). Any conflicts will be resolved in the following order of precedence: (1) the General Terms, (2) the Exhibits, and (3) the Orders, unless the less precedential document expressly cites the conflicting terms and explicitly states that it is intended to modify those conflicting terms (in which case the conflicting terms of the Exhibit or Order will control).

<hr/> <p>Buyer Name ("<u>Buyer</u>")</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p> <p><u>Notice Address:</u></p> <p>Street _____</p> <p>City, State, Zip _____</p> <p>Attention: General Counsel</p> <p>Facsimile: _____</p> <p>Email: _____</p>	<hr/> <p>Grantor Name ("<u>Grantor</u>")</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p> <p>Place of Incorporation _____</p> <p><u>Notice Address:</u></p> <p>_____</p> <p>_____</p> <p>Attention: _____</p> <p>Facsimile: _____</p> <p>Email: _____</p>
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# General Terms of Indefeasible Right to Use Agreement

## 1. Definitions

For purposes of this Agreement, the following terms have the following definitions:

"Affiliate" means, with respect to a party, any firm, corporation, partnership, association, trust or other person or entity, whether now or hereafter existing, that directly or indirectly is Controlled by that party.

"Best Practices" means the best then-current standards, practices and technologies generally recognized in the information technology and telecommunications industries.

"Buyer Fibers" means the fibers, conduit (if specified in the Fiber Order), and any other appurtenances thereto identified in a Fiber Order.

"Change of Control" means: (1) Control of a party is acquired in a single transaction or a series of related transactions by an entity which is not an Affiliate of that party (a "Non-Affiliated Entity"); or (2) all or a substantial part of the business or assets of a party are sold or transferred to any Non-Affiliated Entity by way of a single transaction or series of related transactions.

"Commencement Date" means the date that Buyer accepts delivery of the Buyer Fibers associated with a Fiber Order in accordance with Section 4(b).

"Control" means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management or policies of a corporation, firm, business trust, joint venture, association, organization, company, partnership or other business entity, whether through the ownership of more than 25% of the voting rights or securities (or other ownership interest), by contract or otherwise.

"Encumbrance" means any lien, mortgage, pledge, deed of trust, security interest, charge, or any other adverse claim or interest of any kind.

"End Points" means the termination points at each end (or, in the case of a ring, at designated points on the ring) of the Buyer Fibers as set forth in a Fiber Order and other connecting points to which the parties may mutually agree, which will be terminated at a fiber distribution panel provided by Grantor at its cost at a location specified in the Fiber Order.

"Fiber Order" or "Order" means an executed order for Buyer Fibers. The agreed form template is attached as Exhibit A.

"Governmental Authority" means any federal, state, regional, county, city, municipal, local, territorial, or tribal government, whether foreign or domestic, or any department, agency, bureau or other administrative or regulatory body obtaining authority from any of the foregoing.

"Insolvency Event" means: (1) a receiver, administrator or similar officer is appointed over any assets or business of Grantor; (2) Grantor makes an arrangement for the benefit of its creditors; or (3) Grantor goes into liquidation except for the purpose of a genuine amalgamation or reconstruction, or anything similar happens under national, state or local laws of any country.

"Indefeasible Right of Use" or "IRU" means: (i) beneficial right, title and interest in, and exclusive, unrestricted, irrevocable and indefeasible right of use to the Buyer Fibers; and (ii) the nonexclusive, irrevocable, fully paid-up right to use the tangible and intangible property (including all Underlying Rights) necessary for the full use of the Buyer Fibers as contemplated under this Agreement, but excluding any electronic or optronic equipment.

"Performance Standards" means all quantitative and qualitative performance standards and commitments for the Buyer Fibers set forth in this Agreement and any applicable Fiber Order, including Best Practices.

"Personnel" means, with respect to a party, that party's employees, agents, Affiliates, independent contractors, subcontractors, and suppliers of any tier.

"Ready for Service Date" means the date specified in the Fiber Order by which date Grantor must install and deliver the Buyer Fibers.

"Specifications" means all descriptions and specifications for the Buyer Fibers set forth in this Agreement (including Exhibit B) and any applicable Fiber Order, plus all additional favorable written descriptions and specifications that Grantor may furnish to Buyer in connection with any specific Buyer Fibers.

“Underlying Rights” includes all rights, licenses, permits, authorizations, franchises, rights-of-way, easements and other approvals that are necessary for Grantor to obtain in order to permit Grantor to own, install and keep installed, and maintain the Buyer Fibers in accordance with this Agreement and to grant the IRU and all other rights to Buyer under this Agreement and any applicable Fiber Order.

## 2. Scope of Grants

- (a) **General.** Grantor hereby irrevocably sells, conveys, transfers, assigns and delivers to Buyer, and Buyer hereby accepts and acquires from Grantor an IRU in the Buyer Fibers described in a relevant Fiber Order(s). The IRU grant does not convey full legal title or legal ownership of any fibers or equipment. The parties intend the IRU grant to convey a beneficial property interest (as distinguished from a mere contractual interest) and the grant, transfer and conveyance of the IRU effected by this Agreement to be fully completed and effective, with all conditions precedent deemed to have been satisfied in all respects immediately on the Commencement Date. During the Term of this Agreement and the term of any applicable Fiber Order, Grantor has no right to revoke or restrict in any manner or to any degree whatsoever, through injunctive relief or otherwise, the use of the Buyer Fibers granted to Buyer pursuant to this Agreement or any Fiber Order, including following a breach by Buyer of any legal duty or obligation imposed by any contract, including this Agreement, by the law of torts (including simple or gross negligence, strict liability or willful misconduct), or by the laws, rules, regulations, orders, standards or ordinances of any Governmental Authority. The Parties agree that any such breach by Buyer shall be compensable, if at all, by a remedy of monetary damages at law and not at equity. Buyer has no commitment to use any of the Buyer Fibers.
- (b) **Changes to the Buyer Fibers.** Grantor may not, at any time, add to, reconfigure or otherwise vary the Buyer Fibers or any fiber optics communications system of which the Buyer Fibers may be a part, including the capacity, segments, cable landing stations or landing parties (a “Fiber Change”), if that Fiber Change has any adverse effect on Buyer’s rights in or use of the Buyer Fibers as determined by Buyer in its sole discretion, including if it interrupts Buyer’s use of the Buyer Fibers for a continuous period of more than 4 hours or more than an aggregate of 10 hours in any six-month period.
- (c) **Relocation for Failure To Maintain Rights.** If, after the Effective Date, Grantor is required by the provider of any Underlying Right or Governmental Authority (“Relocating Authority”) to relocate the Buyer Fibers or any portion thereof, Grantor may either (1) proceed with such required relocation using its best efforts to minimize all negative impacts to Buyer or (2) pay such amounts to the Relocating Authority as are necessary to avoid the need for such relocation. Grantor will keep Buyer fully informed of such relocation and will consider any recommendations of Buyer in good faith. Grantor will bear all costs of such relocation. Following receipt of notice from Grantor that a relocation will occur, Buyer may elect to terminate this Agreement for breach pursuant to Section 8.3 if such relocation has an adverse effect on Buyer’s rights in or use of the Buyer Fibers as determined by Buyer in its sole discretion.
- (d) **Network Control.** Buyer will (at its full cost and expense) have full and complete control and responsibility for determining any network and service configuration or designs, routing configurations, re-grooming, rearrangement or consolidation of channels or circuits and all related functions with regard to the use of the Buyer Fibers; provided, such determination by Buyer will not materially and adversely affect those portions of Grantor’s network not subject to the IRU and/or any electric or optronic equipment used on Grantor’s network. Buyer shall have the right to use the Buyer Fiber for any lawful purpose, including subleasing or assigning one or more fiber pairs to one or more third parties, provided any such sublease or assignment requires the sublessee/assignee to adhere to all applicable operational requirements in this Agreement
- (e) **On-Site Services.** If Grantor needs to access Buyer’s premises to perform its obligations under this Agreement, Grantor will (1) get Buyer’s permission prior to entering the premises, (2) abide by all of Buyer’s rules, policies, and procedures for on-premises vendors, including such matters as safety, security, health, environmental and hazardous material management, misconduct, physical aggression, harassment, and theft (collectively, “Buyer Rules”); and (3) at Buyer’s request, promptly remove and replace any Grantor Personnel who behaves unlawfully or inconsistently with any Buyer Rule.
- (f) **No Lien.** Neither Grantor nor its Personnel will have, or allow to be placed, any Encumbrance upon any Buyer property, and Grantor waives, and will cause its Personnel and other persons with whom it contracts, to waive, any Encumbrance upon any Buyer property.
- (g) **Maintenance of Buyer Fibers.** During the Term of this Agreement and any extensions, Grantor shall provide maintenance and services in accordance with the provisions of a separate Conduit and Fiber Maintenance and Repair Services Agreement (“Maintenance Agreement”), effective as of the date of this Agreement. In the event Grantor, its Personnel or any assignee or transferee of the Maintenance Agreement fails to provide the required maintenance and services, Buyer and its

Personnel shall have the right to access the Buyer Fibers to perform substitute services as provided in the Maintenance Agreement.

**3. Maintenance of Underlying Rights.** Grantor agrees to maintain during the Term, at Grantor's cost, all Underlying Rights necessary for the construction, installation, maintenance, and repair of the Buyer Fibers. Grantor will ensure that such Underlying Rights are and will remain sufficient to allow Buyer to exercise all rights set forth in this Agreement and any Fiber Order. In the event Grantor is unable to resolve any issue with respect to Underlying Rights in a manner reasonably acceptable to Buyer, and if such issue interferes with or prevents the exercise by Buyer of any of the rights under this Agreement or any Fiber Order, then Buyer may: (i) after providing Grantor 30 days' prior written notice, attempt to resolve the issue directly with the grantor of such Underlying Rights; or (ii) terminate this Agreement for breach pursuant to Section 7.3.

#### **4. Installation and Delivery; Acceptance**

- (a) **Installation and Delivery.** Grantor will install and deliver the Buyer Fibers on or before the Ready for Service Date. Grantor will issue a refund on amounts due in accordance with Section 2 of Exhibit B for failure to deliver the Buyer Fibers on or before the Ready for Service Date.
- (b) **Acceptance Process.** Upon completion of the installation and delivery of the Buyer Fibers, Grantor will notify Buyer that the Buyer Fibers are ready for acceptance testing ("Completion Notice"). Grantor's notice must include with the Completion Notice the results of any required Grantor testing. Within twenty (20) business days of receipt of a Completion Notice, Buyer shall provide Grantor with a written notice accepting or rejecting the Buyer Fibers. Buyer shall have the right to independently test the Buyer Fibers during the twenty (20) business day period; provided that Grantor shall have the right to be present at any such independent testing. Buyer may reject the Buyer Fibers only if they do not conform to the Specifications or Performance Standards, in which case Grantor will promptly correct the deficiency, and the acceptance process described in this paragraph will recommence.
- (c) **Rescheduling Installation.** Buyer may reschedule the Ready for Service Date for up to 30 days without any additional charges by providing written notice at least 60 days in advance of the original Ready for Service Date to Grantor.
- (d) **Exclusions.** Grantor's failure to provide the Buyer Fibers within the time frame required by the Order will be excused to the extent that the failure is caused by the following, as demonstrated to Buyer's reasonable satisfaction by a written root cause analysis (each, an "Exclusion"):
  - (1) Buyer's material failure to perform any of its obligations under this Agreement, but only if Grantor promptly (but no later than 3 business days following the occurrence) provides Buyer with written notice of the failure and a description of how the occurrence prevents Grantor's delivery;
  - (2) Grantor is denied access to any location owned or controlled by Buyer, but only if Grantor notified Buyer of the requirement for access reasonably in advance; or
  - (3) a Force Majeure Event, but only if Grantor complies with its obligations under Section 12(a).

#### **5. Buyer Access**

- (a) **General.** Subject to the requirements of any Underlying Rights (which Grantor will notify Buyer of in the Fiber Order), Buyer will have access to the Buyer Fiber End Points 24 hours a day, 7 days a week.
- (b) **Inspections.** Grantor will have the right, upon not less than 24 hours prior written notice to Buyer, to access the End Points to perform periodic inspections to ensure compliance with this Agreement. Such inspections may occur no more than twice in any 12 month period unless requested by Buyer.

#### **6. Fees**

- (a) **IRU Fee.** For each Fiber Order, Grantor will invoice Buyer for the IRU Fee in a Fiber Order no later than 30 days after the applicable Commencement Date.
- (b) **Taxes.** Each party will be responsible, as required under applicable law, for identifying and paying all taxes and other governmental fees and charges (and any penalties, interest, and other additions thereto) that are imposed on that party upon or with respect to the transactions and payments under this Agreement. Grantor may charge and Buyer will pay applicable national, state or local sales or use taxes or value added taxes that Grantor is legally obligated to charge ("Taxes"), but only if those Taxes are stated on the original invoice that Grantor provides to Buyer and Grantor's invoice states those Taxes separately and meets the requirements for a valid tax invoice. Buyer may provide Grantor with an exemption

certificate or equivalent information acceptable to the relevant taxing authority, in which case, Grantor will not charge or collect the Taxes covered by that certificate. Buyer may deduct or withhold any taxes that Buyer may be legally obligated to deduct or withhold from any amounts payable to Grantor under this Agreement, and payment to Grantor as reduced by those deductions or withholdings will constitute full payment and settlement to Grantor of amounts payable under this Agreement. During the term of this Agreement, Grantor will provide Buyer with any forms, documents, or certifications as may be required for Buyer to satisfy any information reporting or withholding tax obligations with respect to any payments under this Agreement.

- (c) **Payment of Invoices.** Buyer will pay all amounts due and owing under each of Grantor's properly submitted, valid and undisputed invoices within 60 days after receipt. Buyer has no obligation to pay any charges invoiced more than 12 months after they accrue. Grantor will, in accordance with generally accepted accounting principles, keep copies of all books and records relating to the charges invoiced during the applicable IRU Term and for 10 years thereafter. If Buyer disputes any invoice, Grantor will provide a written clarification within 10 business days, and Buyer may, upon prior written notice and during normal business hours, examine Grantor's books and records relating to the disputed charges. Buyer's obligation to pay a disputed invoice accrues from the date the parties resolve the dispute. Buyer may set off any amount payable by Buyer by any amount that Grantor is obligated to pay Buyer under this Agreement or any Fiber Order.

## 7. Term; Termination

**7.1. Term of the Agreement.** This Agreement is effective on the Effective Date and will continue in effect until the termination of this Agreement by either party in accordance with the next sentence or by Buyer in accordance with the rest of this Section 7. After the termination or expiration of the last Fiber Order in effect under this Agreement, either party may terminate this Agreement with 180 days' prior written notice.

**7.2. Term of Fiber Order(s).** Unless earlier terminated by Buyer in accordance with the terms of this Agreement, the initial term of a Fiber Order begins on its Commencement Date and continues for the term stated in that Fiber Order (together with any options to extend the term of the Fiber Order exercised by Buyer, the "Fiber Order Initial Term"). When a Fiber Order Initial Term expires, the term of that Fiber Order will continue until either (1) Buyer gives Grantor at least 30 days' prior written notice of termination or (2) Grantor gives Buyer at least 180 days' prior written notice of termination ("Extension Term"). Notwithstanding anything to the contrary, at any time prior to Grantor giving written notice of termination, Buyer may, at its exclusive option, exercise an option to append two additional 5 year terms beginning at the end of the then-current term (which for purposes of the Extension Term will be 30 days after Buyer's exercise of such option); provided, however, that no Extension Term shall require Grantor to provide Buyer Fiber longer than the commercially useful life of the Buyer Fiber provided during a Fiber Order Initial Term.

### 7.3. Termination of Agreement or Fiber Order by Buyer for Breach or Insolvency.

(a) Buyer may terminate this Agreement or any or all Fiber Orders without any further liability if:

1. Grantor breaches any material obligation, other than its confidentiality obligations, under this Agreement or a Fiber Order and the breach remains uncured for 5 business days after Buyer delivers written notice of the breach to Grantor (or any longer cure period that Buyer approves in writing, but only if Grantor diligently proceeds to cure the breach);
2. Grantor breaches its confidentiality obligations under this Agreement, or invades privacy or uses personal information in violation of applicable law;
- (3) there is a Change of Control of Grantor, but Buyer may not exercise its termination right under this clause more than 6 months following Grantor's provision of written notice to Buyer of facts establishing a Change of Control;
- (4) an Insolvency Event occurs; or
- (5) except to the extent the failure is caused by an Exclusion (subject to Section 12(a) (Force Majeure)), Grantor fails to complete installation and delivery of any Services under the Order by the 21st day following the Ready for Service Date (or such other date specified in the applicable Fiber Order, the "Late Delivery Termination Date"), but Buyer must exercise this termination right before the Commencement Date. If Grantor has reason to believe that Grantor will not complete installation and delivery of any Buyer Fibers on or before the Ready for Service Date, Grantor will promptly notify Buyer of the circumstances and the date on which Grantor believes it will complete installation and delivery of the Services (the "Revised Delivery Date"). If the Revised Delivery Date is after the Late Delivery Termination Date, Buyer may terminate the Order before the Commencement Date without penalty or fee

of any kind. For clarity, nothing in this clause (5) gives Grantor the right to delay installation, and any reductions in the IRU Fee for late delivery will be measured against the Ready for Service Date, not the Revised Delivery Date.

- (b) In the event that Buyer terminates the Agreement or one or more Fiber Orders under this Section 7.3, at its exclusive option Buyer may elect to receive liquidated damages for any or all terminated Fiber Orders equal to the product of (i) the IRU Fee paid to Grantor under the Fiber Order multiplied by (ii) the quotient of (A) the number of months remaining in the applicable Fiber Order Initial Term after the effective date of termination divided by (B) the total number of months in that Fiber Order Initial Term (for each Fiber Order, the "Liquidated Damages Amount"). Buyer and Grantor agree that the Liquidated Damages Amount is reasonable in light of the anticipated harm that would be caused by Grantor's material breach of this Agreement or Fiber Order, the difficulty in proving a certain loss, the inconvenience and non-feasibility of otherwise obtaining an adequate remedy and the value of the transactions to be consummated under this Agreement. In the event that Buyer elects this remedy, the parties agree that this Liquidated Damages Amount is not a penalty, and receipt of such amount shall be Buyer's sole remedy at law or in equity for Grantor's material breach of this Agreement or Fiber Order. Nothing in this section shall limit Buyer's remedies in law or equity in the event that it chooses not to exercise its right to receive liquidated damages.

**7.4. Termination for Convenience.** Buyer may terminate all or part of any Fiber Order or this Agreement upon at least 90 days' prior written notice to Grantor. Upon the effective date of any termination under this Section, all rights in and use of the Buyer Fibers will revert to Grantor without reimbursement of the IRU Fee or other payments previously made under this Agreement, and from and after the effective date of such termination, Buyer have no further rights or obligations under this Agreement.

**7.5. No other Termination.** Neither party may terminate this Agreement or any Fiber Order other than in accordance with the provisions of this Section 7.

**7.6. Removal of Grantor Equipment Following Termination.** If any Grantor equipment is installed on premises owned or controlled by Buyer or any of its Affiliates in connection with this Agreement, Buyer will give Grantor access during Buyer's normal business hours for 30 days after the termination or expiration of the Agreement for the limited purpose of allowing Grantor to retrieve its equipment. After the 30 day period, Buyer may dispose of any Grantor equipment without liability.

## 8. Representation, Warranties and Certain Covenants

- (a) **By Grantor.** Grantor represents and warrants to, and covenants with, Buyer that: (1) Grantor will provide the Buyer Fibers in a competent, professional and workmanlike manner, free from defects in materials, workmanship and design, and in conformance with the Performance Standards and Specifications; (2) Grantor will promptly and satisfactorily correct any Buyer Fibers that are defective or do not conform with the Performance Standards, Specifications or other requirements of this Agreement; (3) none of the Buyer Fibers will violate, misappropriate or infringe any third party's rights (including intellectual property rights) or confidential information; (4) Grantor will comply with all applicable law, will not cause Buyer to be in violation of any applicable law, and will hold and fully comply with all licenses, permits, authorizations and approvals necessary for the performance of its obligations under this Agreement; (5) Grantor is duly incorporated, validly existing, and in good standing as a company under the laws of the jurisdiction of its formation; (6) Grantor has all rights necessary for (and is not subject to any restriction, penalty, agreement, commitment, law, rule, regulation or order which is violated by) its execution and delivery of this Agreement and performance of its obligations under this Agreement; (7) when performing its obligations under this Agreement, Grantor will not interfere with the activities and obligations of Buyer, its employees, agents or customers; and (8) Grantor will promptly notify Buyer of any matters pertaining to, or the occurrence or impending occurrence of, any event of which it is reasonably aware that could give rise to any interruption in service or any damage (or impending damage) to or loss of all or any part of the Buyer Fibers.
- (b) **By Buyer.** Buyer represents and warrants to, and covenants with, Grantor that: (1) Buyer is duly formed and validly existing under the laws of the State of Oregon; (2) Buyer has all rights necessary for (and is not subject to any restriction, penalty, agreement, commitment, law, rule, regulation or order which is violated by) its execution and delivery of this Agreement and performance of its obligations under this Agreement; and (3) Buyer will use the Buyer Fibers in compliance with all applicable law.

## 9. Defense, Indemnity and Limitation of Liability

- (a) **Indemnification by Grantor.** Grantor will defend, indemnify and hold harmless Buyer, its Affiliates, and its and their respective directors, officers, employees, successors, assigns and agents, from and against all claims, allegations, demands and proceedings by a third party, and all resulting losses, judgments, liabilities, damages, settlements, costs and expenses

(including reasonable attorneys' fees and expenses) (each, a "Third Party Claim"), to the extent arising out of or relating to: (1) Grantor's breach of any of its warranties, representations or covenants under Section 8(a) (including invasion of privacy or use of personal information by Grantor in violation of applicable law or this Agreement; (2) Grantor's fraud, negligence or willful misconduct in the performance of its obligations under this Agreement; (3) any bodily injury (including illness or death) or property damage caused or alleged to be caused by Grantor; (4) infringement or misappropriation of any copyright, patent, trademark, trade secret or other proprietary right of any third party by the provision or use of the Buyer Fibers; (5) employment-related matters (including employment benefits) for Grantor's Personnel; or (6) any breach by Grantor of its confidentiality obligations under this Agreement.

- (b) **Indemnification by Buyer.** To the extent allowed by law, and subject to the limitations of the Oregon Tort Claims Act, Buyer will defend, indemnify and hold harmless Grantor, its Affiliates, and its and their respective directors, officers, employees, successors, assigns and agents, from and against all Third Party Claims to the extent arising out of or relating to: (1) Buyer's breach of any of its warranties, representations or covenants under clause (3) of Section 8(b); (2) the fraud, negligence or willful misconduct of Buyer in the performance of its obligations under this Agreement; or (3) any bodily injury (including illness or death) or property damage caused by Buyer in the performance of its obligations, or use of the IRU Fiber, under this Agreement.
- (c) **Indemnification Procedures.** The indemnifying party will use counsel reasonably satisfactory to the indemnified parties to defend each Third Party Claim and will keep the indemnified parties informed of the status of each Third Party Claim. The indemnified parties will cooperate with the indemnifying party in the defense at the indemnifying party's expense. Any indemnified party may participate in the defense at its own expense. In addition, any indemnified party may, at its own expense and without limiting the indemnifying party's indemnification obligations, take control of its own defense of the Third Party Claim. After taking control of its defense, that indemnified party and its counsel will proceed diligently and in good faith with its defense. Neither party will consent to the entry of any judgment or enter into any settlement without the other party's prior written consent, which consent will not be unreasonably withheld. Each party's obligation to defend is independent of its obligation to indemnify.
- (d) **Waiver of Consequential Damages.** NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY UNDER ANY CIRCUMSTANCES FOR CONSEQUENTIAL DAMAGES (INCLUDING LOST OPPORTUNITIES OR PROFITS) OR PUNITIVE DAMAGES, EXCEPT FOR ANY LIABILITY ARISING OUT OF (1) ITS CONFIDENTIALITY OBLIGATIONS UNDER THIS AGREEMENT, (2) ITS INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT, (3) ITS FRAUD, OR (4) ITS RECKLESS OR WILLFUL MISCONDUCT, INCLUDING WILLFUL BREACH OF THIS AGREEMENT.

## 10. Confidentiality

- (a) **Confidentiality Obligations.** Grantor will: (1) protect and keep confidential the existence of this Agreement, its terms and conditions, and any other information obtained from Buyer in connection with this Agreement or related to the Buyer Fibers that is identified as confidential or proprietary or that, given the nature of the information or the manner of its disclosure, reasonably should be considered confidential or proprietary (including all information relating to Buyer's technology, customers, business plans, marketing activities and finances); (2) use that information only for the purpose(s) for which it was originally disclosed and in any case only for the purpose of fulfilling its obligations under this Agreement; and (3) return all that information to Buyer promptly upon the termination of this Agreement. All that information will remain Buyer's exclusive property, and Grantor will have no rights to use that information except as expressly provided in this paragraph.
- (b) **No Publicity.** Grantor will not use any trade name, trademark, service mark, logo or commercial symbol, or any other proprietary rights of Buyer in any way without prior written authorization of that use by Buyer's most senior administrator. Unless Grantor first obtains Buyer's written authorization, which Buyer shall have sole discretion to provide or deny, Grantor will not issue press releases or publicity relating to Buyer or this Agreement or reference Buyer in any brochures, advertisements, client lists or other promotional materials.
- (c) **No Access to Buyer Data.** Grantor will not record, store, inspect, monitor, read, intercept or otherwise access any data transmitted using the Buyer Fibers. All that data is Buyer's confidential information under the terms of this Agreement. If a governmental entity that has jurisdiction over Grantor requires recording, storage, inspection, monitoring, reading, interception of, or any other access to any of that data, Grantor will (1) notify Buyer of that requirement as soon as possible (to the extent permitted by applicable law) and (2) reasonably cooperate with Buyer to object to that requirement or take such other actions as Buyer reasonably deems appropriate, consistent with applicable law, to ensure the confidential treatment of that data.

- (d) **Injunctive Relief.** Each party acknowledges that any material breach of this Section 10 by it would cause the other party (the "Non-breaching Party") irreparable harm for which the Non-breaching Party has no adequate remedies at law. Accordingly, the Non-breaching Party will be entitled to obtain specific performance or immediate injunctive or other equitable relief for that breach without the necessity of posting any bond or guarantee.

## 11. Insurance

- (a) **Worker's Compensation and General Commercial Liability Insurance.** Grantor will maintain, at its expense, during the entire term of each Order and for ten years after termination thereof (1) "Workers' Compensation" insurance, including coverage for all costs, benefits and liabilities under workers' compensation and similar laws that may accrue in favor of any person employed by Grantor in all geographic areas where Grantor performs services, and "Employer's Liability" insurance with limits of liability of not less than US\$1,000,000, with a waiver of subrogation in each case in favor of Buyer (where permitted by law); (2) "Commercial General Liability" insurance including public liability and product liability insurance with limits of not less than US\$5,000,000 per occurrence and US\$5,000,000 general aggregate to cover loss and damage incurred by Buyer and its Affiliates in connection with this Agreement; and (3) "Professional Indemnity" or "Errors and Omissions" insurance with limits of not less than US\$2,000,000 per claim and with a retroactive date no later than the Effective Date.
- (b) **General.** All insurance maintained by Grantor under this Agreement must be with an A.M. Best rating of "A-VII" or greater (or standard equivalent). Promptly after the effective date of the first Order under this Agreement, and at each policy renewal or at other times on request from Buyer, Grantor will furnish Buyer with certificates of insurance that show the minimum levels of insurance Grantor must maintain under this Agreement. Grantor will send these certificates electronically to Buyer at the notice address provided on the cover page of this Agreement (or such other address as Buyer may specify in writing). Grantor will name Buyer, and its Affiliates and their respective officers, directors, employees, successors, assigns and agents" as additional insureds for the Commercial General Liability policy and will cause each of its policies of insurance (and the underlying property owner's policies, as applicable) to contain a waiver of any right of subrogation on the part of the insurer against the Buyer where permitted by law. Grantor will notify Buyer of any non-renewal, cancellation or change of its coverage at least 30 days before non-renewal, cancellation or change in coverage. The insurance maintained by Grantor under this Agreement must be primary to, and without any right of contribution from, any other insurance that may be available to Buyer. Buyer's approval of any of Grantor's insurance policies does not relieve or limit any of Grantor's obligations under this Agreement.

## 12. Miscellaneous

- (a) **Force Majeure.** Neither party will be responsible for any delay or failure in performance of any part of this Agreement to the extent that the delay or failure in performance is caused by any of the following conditions, and such party's performance shall be excused and extended for and during the period of any such delay: act of God; fire; flood; other adverse weather events; failures, shortages or unavailability or other delay in delivery not resulting from the responsible party's failure to timely place orders therefor; war or civil disorder; strikes or other labor disputes; fiber cut; inability of Grantor to access the Buyer Fibers; or any other cause beyond the reasonable control of the party whose performance is affected (the "Affected Party") and which could not have been avoided or corrected through the exercise of reasonable diligence (a "Force Majeure Event"). The Affected Party will promptly notify the other party in writing of the Force Majeure Event, giving details of the Force Majeure Event circumstances, its anticipated effect upon the Affected Party's performance under this Agreement, and the steps that the Affected Party is taking to remedy the delay. If Grantor's performance is delayed or otherwise affected by any Force Majeure Event for more than 30 days, Buyer may terminate the Agreement upon written notice to the Grantor.
- (b) **Assignment.** This Agreement is binding on the parties and their respective successors and assigns. Except as approved by Buyer in writing, Grantor will not assign any part or all of this Agreement or subcontract or delegate any of Grantor's rights or obligations under this Agreement. Grantor will remain responsible for the full performance of any obligations it subcontracts or delegates to its Personnel, and for all acts and omissions of its Personnel under this Agreement. Any attempt by the Grantor to assign, subcontract or delegate in violation of this paragraph is void in each instance. Buyer may, without notice to or consent from Grantor, assign this Agreement or any Order (or any of its rights and obligations under this Agreement or any Order) to its Affiliates.
- (c) **Governing Law; Venue.** This Agreement is governed by the laws of the State of Oregon, excluding its conflicts of law rules or principles. Grantor irrevocably submits to venue and exclusive personal jurisdiction in the federal court located in Pendleton, Oregon and Gilliam County, Oregon state courts for any dispute arising out of this Agreement, and waives all objections to jurisdiction and venue of such courts.

- (d) **Notices.** Except as otherwise provided in this Agreement, any notice, invoice or other document to be given by either party under this Agreement must be given in writing to the other party at the address below its signature line on the cover page of this IRU. If no address is listed for Grantor, notice must be given to Grantor's last known address. Notice may be delivered by personal delivery, certified mail (return receipt requested), nationally recognized overnight courier service, facsimile (with electronic confirmation to the sender), or email, and will be deemed delivered (1) if by overnight courier service, 1 business day after deposit with a reputable overnight courier with all charges prepaid; (2) if by certified mail, 3 business days after deposit with the mail carrier; and (3) if by personal delivery, facsimile, or email, on the day of delivery, facsimile transmission (with electronic confirmation to the sender), or email transmission, in each case if it is a business day, or the next following business day otherwise. A party may change its notice address by giving notice in accordance with this paragraph.
- (e) **Independent Contractors.** Grantor and Buyer are independent contractors. Grantor has exclusive control over its Personnel, its labor and employee relations and its policies relating to wages, hours, working conditions and other employment conditions. Grantor has the exclusive right to hire, transfer, suspend, lay off, recall, promote, discipline, discharge and adjust grievances with its Personnel. Grantor is solely responsible for all salaries and other compensation of its Personnel. Grantor is solely responsible for making all deductions and withholdings from its employees' salaries and other compensation and paying all related contributions, taxes and assessments. Grantor's Personnel are not eligible to participate in any employment benefit plans or other benefits available to Buyer employees. Neither party has any authority to bind the other party to any agreement or obligation.
- (f) **Severability.** If any provision of this Agreement is determined to be unenforceable, this Agreement will be enforced as if the unenforceable provisions were not present, and any partially valid and enforceable provisions will be enforced to the extent that they are enforceable.
- (g) **No Waiver.** Neither party waives any right under this Agreement by failing to exercise any rights under this Agreement. Any waiver granted under this Agreement will be effective only if stated in a writing signed by the party granting the waiver.
- (h) **Cumulative Rights.** Except as otherwise expressly provided in this Agreement, the parties' rights and remedies under this Agreement are cumulative, and either party may enforce any of its rights or remedies under this Agreement or other rights and remedies available to it at law or in equity.
- (i) **Construction.** The section headings in this Agreement are for convenience of reference only and will not be given effect to interpret or construe any provisions of this Agreement. Each party has sought the advice of legal counsel and has participated to a significant degree in the drafting and preparation of this Agreement. Accordingly, no provision of this Agreement will be construed against any party on the basis of that party being the drafter. Wherever used in this Agreement, the singular includes the plural, and the plural includes the singular; the use of any gender, tense or conjugation includes all genders, tenses and conjugations; and the word "including" means "including, without limitation."
- (j) **Counterparts.** This Agreement may be executed by facsimile or other electronic means and in any number of counterparts, each of which when executed and delivered will be an original, which together will constitute one and the same agreement.
- (k) **Survival.** Any provisions of this Agreement which, by their nature, should survive or may reasonably be interpreted as surviving the termination or expiration of this Agreement, including provisions relating to payment obligations arising before termination or expiration, defense and indemnity obligations, limitations of liability, and confidentiality obligations, will survive the termination or expiration of this Agreement and continue in full force and effect.
- (l) **Entire Agreement.** This Agreement (including the Exhibits), together with all other attachments, all of which are incorporated into this Agreement, constitute the complete and final agreement of the parties relating to the IRU and supersede the parties' prior or contemporaneous agreements, understandings and discussions relating to the IRU. No modification of this Agreement will be binding unless in writing and signed by Buyer and Grantor. Any standard documents or terms or conditions maintained by Grantor, whether or not filed with a government agency, including those published from time to time on a Grantor web site, are effective only for the purpose of providing a technical description of Grantor's standard offerings; any such standard documents or terms or conditions (including service levels, service credits, charges, conditions of usage, monitoring or filtering of traffic, disclosure of customer information, indemnification, limits on liability and exclusive remedies, ownership and intellectual property rights, or suspension and termination rights) will have no effect on, and will not supersede, cancel, modify or supplement the terms and conditions of this Agreement. NEITHER PARTY WILL BE BOUND BY, AND EACH SPECIFICALLY OBJECTS TO, ANY PROVISION THAT IS DIFFERENT FROM OR IN ADDITION TO THIS AGREEMENT (WHETHER PROFFERED VERBALLY OR IN ANY QUOTATION, INVOICE, SHIPPING DOCUMENT, ACCEPTANCE, PURCHASE ORDER CONFIRMATION, CORRESPONDENCE, WEBSITE, DOCUMENTATION, CLICK THROUGH

AGREEMENT, SHRINK WRAP AGREEMENT OR OTHERWISE), UNLESS THAT PROVISION IS SPECIFICALLY AGREED TO IN A WRITING SIGNED BY BOTH PARTIES.

- (m) **Tariffs.** If there is an inconsistency between this Agreement and Grantor's tariffs or other regulatory filings which precludes Buyer from receiving any or all of the rights and benefits provided by this Agreement, Grantor will notify Buyer and promptly amend the tariff or otherwise resolve the inconsistency to provide such rights or benefits to Buyer. If that is not legally possible, Grantor will promptly inform Buyer, and Buyer may terminate any or all of the affected Orders pursuant to Section 7.3.
- (n) **Rights of Third Parties.** This Agreement does not create or confer any rights or benefits enforceable by any person not a party to it.
- (o) **Time of the Essence.** Time is of the essence for Grantor's performance of its obligations under this Agreement.

## Exhibit A – Sample Fiber Order Form

### Fiber Order Form

This Fiber Order is effective as of the last date signed below (the “Effective Date”) and entered into under and made a part of the Indefeasible Right to Use Agreement between Buyer and Grantor effective \_\_\_\_\_ (the “Agreement”). Buyer and Grantor have received and read a copy of the Agreement, and agree that along with this fully-executed Fiber Order it governs the transaction contemplated herein.

<b>General Terms</b>	
Billing Address	
Ready for Service Date	
Late Delivery Termination Date	
Term	_____ years (measured from Commencement Date)
Diversity Required	<input type="checkbox"/> Yes <input type="checkbox"/> No
Routing Requirements <sup>1</sup>	<input type="checkbox"/> None <input type="checkbox"/> Route diagram attached <input type="checkbox"/> Route diagram provided in electronic file Filename: Date provided to Buyer:

<sup>1</sup> If route diagrams apply, Grantor will route the Buyer Fibers as depicted in the applicable route diagrams. Any text set forth in the Route Diagrams will have no legal meaning or effect for purposes of this Buyer Fiber Order, other than to depict the physical routes of the Buyer Fibers.

End Points	
End Point Code	Physical Address
A-End	
Z-End	

No. Fiber Pairs	A-End		Z-End		Additional Requirements <sup>2</sup>		
	Site Code	Demarcation Point	Site Code	Demarcation Point	Max Distance	Max db Loss	Max Round-Trip Latency

IRU Charges	Amount	Additional Terms
Non-Recurring Charge (NRC)		
Monthly Recurring Charge (MRC)	\$0.00	

Additional Terms
1.

<sup>2</sup> The distance, end-to-end db loss, and round-trip latency for each fiber pair between Demarcation Points, including all splices and patches, must not exceed any specified maximum values.

\_\_\_\_\_  
Buyer Name ("Buyer")

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

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

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

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

Notice Address:

Street

City, State, Zip

Attention: General Counsel

Facsimile:

Email:

\_\_\_\_\_  
Grantor Name ("Grantor")

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

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

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

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

Notice Address:

\_\_\_\_\_

\_\_\_\_\_

Attention: \_\_\_\_\_

Facsimile: \_\_\_\_\_

Email: \_\_\_\_\_

**Exhibit B to  
Indefeasible Right of Use Agreement**

**Buyer Fiber Specifications**

- 1. General.** Grantor will perform fiber testing as described in this Exhibit on each span of the Buyer Fibers and will provide Buyer with results documentation (in electronic format reasonably requested by Buyer).
- 2. Installation and Testing.** If Grantor fails to complete installation and testing of the Buyer Fibers by the Ready For Service Date as required under this Agreement, Buyer will be entitled to a reduction equal to 3% of the percentage of the IRU Fee for each day that passes beyond the Ready For Service Date.
- 3. Power Testing.** Grantor will conduct end-to-end loss measurements for each Buyer Fiber in the span and from both directions using an industry-accepted laser source and power meter, using the bi-directional average to determine the end-to-end loss at each appropriate wavelength. Grantor will conduct this testing at both 1310 nm and 1550 nm for Standard Single Mode Fiber, and at 1550 nm for Dispersion Shifted Fiber (True Wave™, LEAF™, etc.) or for spans that include both Standard Single Mode Fiber and Dispersion Shifted Fiber. Testing must ensure fiber continuity and the absence of crossed fibers in the span. Testing must be conducted where the Buyer Fiber is terminated by Grantor in fiber distribution panels at both ends of the span.
- 4. Manholes.** Unless specified in an Order, all manholes provided by Grantor will be exclusively for Buyer Fibers, and Grantor will not permit any third parties (including Grantor) to route other fibers through the Buyer manholes or otherwise occupy any space within the manholes.
- 5. OTDR Testing**

- (a) Grantor will conduct optical time-domain reflectometer (“OTDR”) testing at both 1310 nm and 1550 nm wavelengths when the Buyer Fiber consists of Standard Single Mode Fiber, and at 1550 nm if the Buyer Fibers consist of either Dispersion Shifted Fiber (TrueWave™, LEAF™, etc.) or a combination of Single Mode and Dispersion Shifted fiber types. Grantor will conduct OTDR testing on a bi-directional basis for each Buyer Fiber in each span. However, if due to length or attenuation reasons the Buyer Fiber span exceeds the OTDR dynamic range, a portion or the entire span may be tested on a unidirectional basis. Alternatively, the Buyer Fiber span may be divided into shorter testing spans, to the extent reasonably possible, in order to obtain bi-directional analysis. Also, in instances where Buyer intends to accept Buyer Fibers that are not terminated at one end by Grantor in a fiber distribution panel (such as in a manhole or handhole), only unidirectional testing will be performed. Based on the foregoing OTDR testing methodology, each Buyer Fiber span must meet the following minimum performance requirements, excluding loss associated with splices and connectors:

<b>Fiber Type and Wavelength</b>	<b>Maximum Attenuation Coefficient (dB/km)</b>
Singlemode at 1310 nm	0.35
Singlemode at 1550 nm	0.25

- (b) Grantor will provide a turnover documentation package containing the actual traces detailing the testing parameters (including pulse width, averaging and range). The average bi-directional splice loss for all splices within each span must be 0.10 dB or less. The average bidirectional connector loss for all connectors within each span must be 0.50 dB or less.
- (c) Grantor will provide all traces in electronic format reasonably requested by Buyer using GR 196 format. If the average bi-directional splice loss of each span exceeds 0.10 dB, Grantor will provide upon Buyer’s request documentation of at a least three attempts to reduce this value to below 0.10 dB.