

**INTERGOVERNMENTAL AGREEMENT
BETWEEN THE CITY OF SALEM AND
SALEM-KEIZER SCHOOL DISTRICT 24J**

This INTERGOVERNMENTAL AGREEMENT (“Agreement”) is made and entered into by and between the City of Salem, an Oregon municipal corporation (“City”), and the Salem-Keizer School District 24J, a municipal corporation (“School District”) (collectively referred to herein as the “Parties”).

RECITALS

1. Pursuant to federal law, state statutes, the Salem City Charter, and Salem Revised Code (SRC) section 35.020, the City is authorized to grant the non-exclusive right to occupy the City’s Rights-of-Way or other public property in order to construct, operate, use and maintain telecommunications service, gas service, electricity and other public utilities, within the municipal boundaries of the City of Salem.
2. The City has found that the School District is a municipal corporation authorized under ORS Chapter 332 to provide public K-12 education within the City of Salem. The School District’s use of the City’s Rights-of-Way is not for the purpose of a business enterprise for commercial purposes.
3. The Parties agree that the School District will not derive any Gross Revenue from the Telecommunications Service provided on the Telecommunications System occupying the City’s Rights-of-Way pursuant to this Agreement.
4. The School District is eligible for a grant under the federal E-rate program. Under the terms of the grant, the School District is prohibited from deriving Gross Revenue from the Facilities used to provide Telecommunications Services subject to this Agreement.
5. The City has found that the School District provides a unique service to its constituents for public benefit and not for commercial gain, and which will be furthered by the execution of this Agreement.
6. The School District desires to enter into an intergovernmental agreement with the City, pursuant to ORS Chapter 190 and SRC Chapter 35, to authorize the use of the City’s Rights-of-Way. The School District is organized as a public corporation organized under ORS 332.072 and authorized to enter into an intergovernmental agreement as a unit of local government as defined in ORS 190.003.

AGREEMENT

SECTION 1. DEFINITIONS; RULES OF CONSTRUCTION.

1.1 Throughout this Agreement, captions are intended solely to facilitate reading and reference and shall not affect the meaning and interpretation of this Agreement.

1.2 When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The word “shall” is always mandatory and not merely directory.

1.3 For the purpose of this Agreement, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise.

1.3.1 “Agreement” means this Agreement, as fully executed by the City and the School District.

1.3.2 “City” means the City of Salem, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

1.3.3 “City Engineer” means the City Engineer of the City of Salem, or any designee thereof.

1.3.4 “City Manager” means the City Manager of the City of Salem, or any designee thereof.

1.3.5 “City Council” or “Council” means the governing body of the City of Salem.

1.3.6 “Facility” means any tangible component of the School District’s Telecommunications System including, but not limited to, fiber, wires, cables, pipes, mains, ducts, conduits, vaults, pedestals, poles, antennas, power boxes, cabinets and electronic equipment.

1.3.7 “Franchise Administrator” means the Franchise Administrator of the City of Salem, or any designee thereof.

1.3.8 “Gross Revenues” means any and all revenue in whatever form, grant, subsidy, exchange, or otherwise directly or indirectly received by the School District for Telecommunications Service provided to subscribers within the City of Salem subject to all applicable limitations imposed by federal and/or state law.

1.3.9 “Minimum Annual Fee” means the minimum annual amount paid to the City of Salem under this Agreement. The Minimum Annual Fee for this Agreement shall be ten thousand dollars (\$10,000).

1.3.10 “Person” means any individual, governmental entity, sole proprietorship, partnership, association, joint stock company, trust, limited liability company, or other form of organization authorized to do business in the State of Oregon, and includes any natural Person.

1.3.11 “Rights-of-Way” means the surface of, and the space above and below, any street, road, alley, highway, sidewalk, utility easement, public square, public park, or other public place owned or otherwise held by the City.

1.3.12 “Risk Manager means the Risk Manager of the City of Salem, or any designee thereof.

1.3.13 “Telecommunications Service” means any service provided for the purpose of voice, video or data transmission, including, but not limited to, local exchange service, access service, extended area service, call origination, interconnection, switching, transport, call termination and/or any other telecommunications service identified and authorized by the Federal Communications Commission (“FCC”) or the Oregon Public Utilities Commission. Telecommunications Service does not include any of the following: cable service as defined by 47 U.S.C. § 522; open video system service as defined in 47 C.F.R. § 76; private communications system services provided without using the public rights-of-way; over-the-air radio or television broadcasting to the public-at-large from Facilities licensed by the FCC or any successor thereto; direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996; or commercial mobile radio service as defined by 47 C.F.R. § 20.3.

1.3.14 “Telecommunications System” means all Facilities owned, leased, rented, maintained or used by the School District for the purpose of providing Telecommunications Service and located in, under and/or above Rights-of-Way.

SECTION 2. GRANT OF AUTHORITY.

2.1 The City hereby grants to the School District the non-exclusive right to occupy the City’s Rights-of-Way for the purpose of construction, use, operation and maintenance of a Telecommunications System. The School District shall use its Telecommunications System solely to provide Telecommunications Service.

2.2 Prior to providing any telecommunications services via all or part of the Telecommunications System that is the subject of this Agreement, the School District shall apply for and obtain such authority from the Oregon Public Utility Commission and/or the Federal Communications Commission, if required under State or Federal law. The School District shall provide the City with documentation of such authority upon written request.

2.3 This Agreement and the grant of authority conferred herein are not exclusive. The City reserves the right to grant the authority to others to use the City’s Rights-of-Way or other public property during the term of this Agreement. The School District shall respect the rights and property of the City and other authorized users of the Rights-of-Way. This Agreement does not confer on the School District any right, title or interest in any Right-of-Way beyond that expressly conferred herein. This Agreement does not confer any right or privilege to use or

occupy any other property of the City or any other entity.

2.4 Nothing in this Agreement shall be construed to prevent the City from constructing sewers; from grading, paving, repairing or altering any Right-of-Way or from constructing, installing, repairing or removing water mains or any other public work or improvement. If any of the School District's Telecommunications System interferes with the work described in this subsection, the School District's Telecommunications System shall be removed or replaced according to Section 11 of this Agreement.

SECTION 3. EFFECTIVE DATE; TERM; TERMINATION.

3.1 The effective Date of this Agreement shall be the first day following the date on which both Parties sign this Agreement (the "Effective Date").

3.2 This Agreement, and all rights and obligations pertaining hereto, shall, subject to any applicable statutory or regulatory limitations on the maximum term allowed for public contracts, continue in full force and effect for an initial term of ten (10) years, commencing on the Effective Date. Unless sooner terminated by either party as set forth in subsections 3.3 and 3.4 below, at the end of the initial ten year term, this Agreement shall renew automatically for two (2) additional five (5) year terms. Pursuant to Oregon Revised Statute ("ORS") 221.460, in no event shall the term of this Agreement extend beyond twenty (20) years from the Effective Date.

3.3 This Agreement may be terminated by mutual written consent of the Parties at any time.

3.4 Either party may terminate this Agreement at any time and for any or no cause by providing not less than one hundred and eighty (180) days advance written notice to the other party, provided, however that this Agreement shall automatically terminate if the School District does not pay the fee required under Section 5 within one hundred and eighty (180) days of its due date.

3.5 Nothing in this section shall be interpreted as limiting or altering the rights of the City or the process for the City to exercise its rights under Section 20 of this Agreement, including but not limited to, the amount of prior notice the City must provide the School District as provided for in Section 20 of this Agreement.

3.6 Upon termination of this Agreement, the disposition of the School District's property and Facilities that occupy the Rights-of-Way shall be governed by Section 17 of this Agreement.

SECTION 4. PERFORMANCE.

4.1 To the extent authorized by law, this Agreement is subject to the Charter of the City of Salem and general ordinance provisions passed pursuant thereto, now in effect or hereafter made effective.

4.2 During the entire term of this Agreement, the School District agrees to comply with all lawful terms and conditions of SRC Chapter 35 and any other provisions of the Salem Revised Code which require underground utilities in subdivisions and partitions, the provisions of which are incorporated herein as though fully set forth. The School District reserves the right to challenge any of the terms and conditions of Chapter 35 under applicable federal and state law in the future.

SECTION 5. PAYMENTS; AUDITING.

5.1 As compensation for the benefits and privileges granted pursuant to this Agreement, and in consideration for use of the Rights-of-Way, the School District shall pay to the City an annual (based on the calendar year) fee for the duration of this Agreement. The fee amount shall be the Minimum Annual Fee of ten thousand dollars (\$10,000). The School District represents and warrants that it does not and will not derive Gross Revenues from Telecommunications Services provided for under this Agreement. If the School District begins deriving such Gross Revenues during the term of this Agreement, the School District shall immediately notify the City in writing and agree to negotiate amendments to this Agreement to comply with SRC 35.220, to provide for payment terms for auditing procedures, and to designate the provisions of the amendments as material to this Agreement.

5.2 The School District shall remit to the City the annual fee payable under Section 5.1 as follows:

5.2.1 Within thirty (30) days of the Effective Date, the School District shall pay to the City all annual payments for the initial ten-year term of this Agreement, as provided for in Section 3.2. The \$100,000 payment (\$10,000 Minimum Annual Fee x 10 year initial term) shall constitute payment of the first Minimum Annual Fee due and a pre-payment of the remaining Minimum Annual Fees to be due during the initial term of this agreement.

5.2.2 Within thirty (30) days of the Effective Date of a five (5) year renewal term, as provided for in Section 3.2, the School District shall pay to the City all annual payments for that five (5) year renewal term. The \$50,000 payment (\$10,000 Minimum Annual Fee x 5 year renewal term) shall constitute payment of the first Minimum Annual Fee due and a pre-payment of the remaining Minimum Annual Fees to be due during that renewal term of this agreement.

5.2.3 No portion of the Minimum Annual Fees paid to the City in accordance with this Section shall be refunded or otherwise credited to the School District against any fees, taxes, charges, penalties, or other financial obligations due to the City if this Agreement is forfeited or otherwise terminated or revoked under the provisions of Section 20 of this Agreement or is terminated by the School District for any reason. If this Agreement is terminated for any other reason, the City shall refund or credit to the School District an amount equal to the pre-paid Minimum Annual Fee for each remaining full annual period of that term of this

Agreement, without proration for the remainder of the current annual period at the time of the forfeiture/termination/revocation of the Agreement.

5.3 Pre-Agreement Negotiation and Administration Fee. The School District shall pay the City five thousand dollars (\$5,000.00) for its pre-Agreement costs, including the negotiation and initial administration of this Agreement. The Pre-Agreement Negotiation and Administration Fee shall be due and payable within thirty (30) days of the Effective Date.

5.4 Fee payments not received by the City on or before the due date shall be assessed interest based on the average prime interest rate set by the bank with which the City contracts for its general banking services on December 31st of the previous year, plus three percent (3%). At no time shall interest be reduced to less than twelve percent (12%). Interest shall be due on the entire late payment from the date on which the payment was due and payable until the date on which the City receives the payment. Interest shall accrue without regard to whether the City has provided notice of the delinquency.

5.5 No acceptance of any fee payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim that the City may have for further or additional sums payable.

SECTION 6. REPORTS.

6.1 No later than February 15 of each calendar year that this Agreement is in effect, the School District shall submit a written report to the City certifying that no Gross Revenues were earned during the preceding calendar year. This report shall be accompanied by a written declaration signed by an authorized officer or agent of the School District under penalty of perjury with the following language included immediately above the signature of the declarant: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury." Such report shall be in a form satisfactory to the City.

6.2 Within thirty (30) days of receipt of same, the School District shall submit to the City copies of all decisions, orders, and judgments by any federal, state and local court, regulatory agency, and other government body, in which the School District is a party, which substantially and materially affects the School District's obligations under this Agreement.

6.3 The School District shall make available to the City, upon not less than fourteen (14) days prior written notice, such information or reports pertinent to enforcing the terms of this Agreement, in such form and at such time as the City may request.

SECTION 7. CHANGE OF LAW; AMENDMENT OF INTERGOVERNMENTAL AGREEMENT.

7.1 This Agreement may be amended from time to time to conform to any changes in the controlling federal or state law, or other changes material to this Agreement. Each party agrees to bargain in good faith with the other party concerning such proposed amendments. This Agreement also may be amended by mutual consent of the Parties or their successors-in-interest.

Any amendments hereto shall be by written instrument executed with the same formalities as this Agreement.

7.2 To the extent any lawful City rule, ordinance, or regulation is adopted or amended and is generally imposed on similarly situated Persons or entities, the rule, ordinance or regulation shall apply without need for amendment of this Agreement. The City shall provide the School District with notice of any such change in law prior to its adoption. Such change will not affect the School District's reserved right of challenge as described in Section 4 of this Agreement.

SECTION 8. TAXES AND FEES.

Payment of the fee due under this Agreement shall not exempt the School District from the payment of any other license fee, permit fee, tax or charge on the business, occupation, property, activity or income of the School District that may be lawfully imposed by the City or any other taxing authority, except as may otherwise be provided in the ordinance or laws imposing such other license fee, permit fee, tax or charge.

SECTION 9. INSURANCE; PERFORMANCE LETTER OF CREDIT; CONSTRUCTION BOND.

9.1 The School District shall obtain and maintain in effect during the term of this Agreement a policy or policies of commercial general liability insurance with combined single limits, or the equivalent, of not less than \$2,000,000 (two million dollars) per occurrence/ \$4,000,000 (four million dollars) in the aggregate for Bodily Injury, Death Property Damage, Contractual Liability, and Completed Operations. The School District shall also obtain and maintain in effect during the term of this Agreement Professional Liability coverage with combined single limits of not less than \$2,000,000 (two million dollars). The insurance shall be without prejudice to otherwise existing coverage and shall name and cover as additional insureds the City, its officers, agents, and employees. The School District shall be financially responsible for all pertinent deductibles, self-insured retention and/or self-insurance. The certificate of insurance as specified under subsection 9.2 below shall provide that this insurance shall not be canceled or materially altered without thirty (30) days written notice first being given to the City Manager and the City's Franchise Administrator. If the insurance is canceled or materially altered within the term of this Agreement, the School District shall provide a replacement policy with the same terms.

9.2 The School District shall maintain on file with the City's Franchise Administrator a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the approval of the City's Risk Manager. Liability insurance through a captive insurance provider that is the primary carrier for School District shall be acceptable under this Agreement so long as the minimum coverage amounts required under this Agreement are satisfied.

9.3. Construction Bond or Irrevocable Letter of Credit. During all times when the School District is performing any construction work in or under the City's Rights-of-Way

requiring a permit, the School District shall post, through its contractor(s), a construction bond or irrevocable letter of credit, running to the City, with good and sufficient surety approved by the City, in the sum of ten thousand dollars (\$10,000). The bond or letter of credit shall be conditioned that the School District shall well and truly observe, fulfill, and perform each term and condition under the applicable permit. The School District shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated upon final approval of the School District's construction work in or under the Rights-of-Way by the City Engineer or his designee. Upon such approval, the City agrees to sign all documents necessary to release the bond or letter of credit in accordance with the terms of this Section. For the duration of any construction work, the School District shall file with the City's Franchise Administrator a copy of the bond or letter of credit, along with written evidence of payment of the required premiums.

SECTION 10. INDEMNIFICATION.

10.1 Subject to the limitations set forth in ORS 30.260 through ORS 30.300, the Oregon Tort Claims Act, and the Oregon Constitution each party shall indemnify, defend and hold harmless the other, and the other's officials, agents and employees, against any and all claims, demands, causes of action, suits, proceedings, damages, costs, reasonable attorney's fees or liabilities ("Claims") arising out of, pertaining to, or occurring through the exercise of, the rights and privileges retained by, granted to, or exercised by that party pursuant to this Agreement. Each party shall give to the other notice in writing of any such Claims within twenty (20) days of the date that party receives notice of any such Claims. Neither party shall settle, compromise or take any action prejudicial to the other's defense of or interest in such Claims without the express written consent of the other party.

10.2 The School District also shall indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from the School District's failure to remove, adjust or relocate any of its Facilities in the Rights-of-Way in a timely manner in accordance with a relocation schedule furnished to the School District by the City Engineer, unless the School District's failure arises directly from the City's negligence or willful misconduct.

10.3 The School District agrees to forever indemnify the City against any claims, suits, actions, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of any hazardous substance as defined in ORS 465.200(16) caused by the School District's ownership, operation or maintenance of a Telecommunications System in the Rights-of-Way.

SECTION 11. CONSTRUCTION AND RELOCATION.

11.1 The School District shall maintain maps and data pertaining to all of its Facilities located in the City on file at an office in Oregon. With no less than twenty-four (24) hours prior notice, the City may inspect the maps and data at any time during business hours. Upon request of the City and without charge, the School District shall furnish current maps and data to the

City, either in printed form or, if the City maintains compatible data base capabilities, then by electronic data in read-only format, showing the location of all the School District's Facilities within the City. Upon completion of any and all of its Facilities in the Rights-of-Way, the School District shall provide a map consistent with this Section to the City, showing the location as-built of its installed Telecommunication System in the Rights-Of-Way. Such as-built maps shall be in a form acceptable to the City Engineer and shall define specific locations of Facilities. Unless permitted by law, the City will not sell or transmit the School District maps or data to third parties unless permitted by the School District. The City will make available to the School District at no cost any relevant City-prepared maps or data.

11.2 Subject to applicable rules and regulations of the City, the School District may perform all excavations and other work necessary to construct, operate and maintain its Telecommunications System. All construction and maintenance of any and all Facilities within Rights-of-Way shall, regardless of who performs the excavation, installation and/or construction, are and shall remain the responsibility of the School District. The School District shall apply for and obtain all permits necessary for excavation, installation, construction, and/or maintenance of any Facilities located in the Rights-of-Way and shall pay all applicable fees due for City permits. The School District must also give such notice as required by law to other franchisees, licensees or permittees of the City, and/or other units of government owning or maintaining Facilities which may be affected by the proposed work.

11.3 Prior to beginning any excavation, installation, or construction work, the School District shall provide the City with an initial schedule and the estimated total cost of such work. When the School District's work under its permit is completed, the School District shall provide the City with the total amount of Right-of-Way, measured linearly, occupied by the School District's Telecommunications System, and with a map showing the location of its installed Telecommunications System, as-built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

11.4 All work by the School District in the Rights-of-Way shall be properly safeguarded for the prevention of accidents. All of the School District's work under Sections 11 and 12 of this Agreement shall be done in strict compliance with all applicable laws, ordinances, rules and regulations of the City and the State of Oregon.

11.5 Within thirty (30) days of any change in location of the School District's Telecommunications System, the School District shall provide a map to the City Engineer, showing the location of the School District's Telecommunications System on whatever standard scale the City adopts for general use. The School District shall also provide such maps in an electronic format acceptable to both the City and the School District.

11.6 In the event that emergency repairs to its Telecommunications System are necessary, the School District shall immediately notify the City of the need for such repairs. The School District may immediately initiate such emergency repairs and shall apply for appropriate permits the next business day following discovery of the emergency. The School District shall comply with all City ordinances and regulations relating to any excavations or construction undertaken during emergency repair work, including the payment of permits or license fees. If

emergency work has been done in a manner or location unacceptable to the City, the City shall notify the School District in writing. The School District shall make all appropriate modifications and relocation within sixty (60) days of such written notice.

11.7 The School District shall comply with ORS 757.542 through ORS 757.562 and the rules and regulations promulgated thereunder in making excavations.

11.8 The City shall have the right to require the School District to change the location of any of its Facilities located within the Rights-of-Way when public convenience and necessity requires such change, and the expense thereof shall be paid solely by the School District. Should the School District fail to remove or relocate any such Facilities by the date established by the City, which, except in the event of a public emergency, shall not be sooner than ninety (90) days after City's written notice to remove/relocate, the City may cause or effect such removal or relocation, and the expense thereof shall be paid by School District, including all direct, indirect or consequential costs and expenses incurred by the City due to the School District's delay. If the City requires the School District to relocate any of its Facilities located within the Rights-of-Way, the City shall make a reasonable effort to provide the School District with an alternate location for such Facilities.

11.9 As permitted by, and in accordance with SRC 35.430 through SRC 35.496, and any other applicable law, administrative rule, or regulation, the City may require the School District to remove and replace any overhead Facilities with underground Facilities at the same or different locations subject to the School District's engineering and safety standards. The expense of such a conversion shall be paid by the School District. Nothing in this subsection prevents the City and the School District from agreeing to a different form of cost recovery consistent with applicable statutes and administrative rules or regulations on a case-by-case basis.

11.10 The School District's Telecommunications System shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits or other Facilities that may have been laid in the Rights-of-Way by the City or pursuant to the City's authority.

11.11 Upon The School District's acquisition of any Facilities located in the Rights-of-Way, or upon any addition or annexation to the City of any area in which the School District owns or controls any Facilities in the Rights-of-Way, the School District shall submit to the City a written statement describing all Facilities involved, along with any documentation evidencing such acquisition and specifying the location of all such Facilities. Such Facilities shall immediately be subject to the terms of this Agreement upon acquisition or control by the School District.

11.12 The City may require the School District to temporarily remove and/or relocate Facilities located in any Right-of-Way by giving not less than thirty (30) days advance written notice to the School District. Prior to such removal and/or relocation, the City agrees to provide a suitable substitute location for such relocated Facilities to maintain service. The City will assist in acquiring any needed easements if required square footage is not available in the Rights-of-Way. The cost of removal and relocation of its Facilities to accommodate public projects

shall be paid by the School District; however when such removal and relocation are to be temporary and both the initial and the subsequent relocation are for public projects and not at the request of or to accommodate a private party, initial relocation costs shall be paid by the School District and the costs of subsequent relocations occurring less than two years after the initial relocation shall be paid by the City.

11.13 Nothing in this Agreement shall be construed in any way to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or doing any work in any Rights-of-Way. The City shall coordinate any such work with the School District to avoid, to the extent reasonably foreseeable, any obstruction, injury or restriction on the use of any of the School District's Facilities. Nothing in this Section relieves the School District from its obligations set forth in Section 8.

SECTION 12. RESTORATION OF RIGHTS-OF-WAY.

12.1 Whenever the School District disturbs the surface of any Right-of-Way for any purpose, the School District shall promptly restore the Right-of-Way to as good or better condition than it had been prior to such disturbance.

12.2 All restoration of Rights-of-Way surfaces shall be subject to the approval of the City Engineer who may issue an order requiring correction of the restoration work. If the correction order is not complied with within thirty (30) days or any other such time as may be specified in the order, the City may restore the surface of the Rights-of-Way, in which case the School District shall pay all costs of the restoration work to the City, including the resurfacing, inspection, supervision, and administrative costs of the resurfacing. If the City restores the surface of any Rights-of-Way under this Subsection, the School District shall also pay for the cost of issuing the correction order. If the work by the School District creates a public safety hazard as determined by the City Engineer, the School District may be required to repair or restore such Right-of-Way within twenty-four (24) hours of such determination or within such time as otherwise agreed upon by the City Engineer and the School District.

12.3 The School District may prune or cause to be pruned, using proper arboricultural practices, any tree located in the Right-of-Way which substantially interferes with the School District's Telecommunications System if the School District gives no less than fourteen (14) days advance written notice to the City's Urban Forester, the City's Franchise Administrator and any adjoining property owners. Such pruning work shall be the minimum amount required to alleviate the substantial interference with the operation of the School District's Telecommunications System. Any contractor engaged by the School District to perform work under this Subsection must be approved by the City in advance of the performance of any work. Any wood, debris or other matter resulting from the pruning of trees shall be removed from the Right-of-Way on the same day pruning occurs.

SECTION 13. USE OF DUCTS BY CITY; COMMON USERS.

13.1 For purposes of this Section:

13.1.1 "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

13.1.2 "Conduit Facility" means any structure, or section thereof, containing one or more ducts, conduits, manholes, hand holes or other such Facilities in the School District's Telecommunications System.

13.1.3 "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.

13.1.4 "Licensee" means any Person, governmental entity, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association franchised, licensed or otherwise permitted by the City to use the Rights-of-Way. For the purpose of this Section, the School District shall not be construed to be a "Licensee" as defined herein.

13.1.5 "Municipal Purposes" includes, but is not limited to, the use of the structures and for City fire, police, traffic, water, telephone, or signal systems. "Municipal Purposes" does not include: (1) the sale or lease of Telecommunications Services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers; or (3) the transportation of water or wastewater.

13.1.6 "Surplus Ducts or Conduits" are Conduit Facilities other than those occupied by the School District or any prior Licensee, one unoccupied Duct held by the School District as an emergency use spare, and other unoccupied Ducts that the School District reasonably expects to use within the next eighteen (18) months.

13.2 The School District acknowledges that the Rights-of-Way have a finite capacity for containing Ducts and conduits. Therefore, the City Engineer may require the School District to permit a Licensee to use the School District's Surplus Ducts or Conduits in common with the School District, pursuant to the terms and conditions of an agreement between the School District and the Licensee and in accordance with applicable federal laws, rules, and regulations. If the School District and Licensee fail to agree to the use of such Surplus Ducts and Conduits within a reasonable time, the City Council shall establish by resolution such terms, conditions and regulations for such common use as it may determine to be fair and equitable.

13.3 A Licensee occupying part of a Duct shall be deemed to occupy the entire Duct.

13.4 The School District shall give not less than 120 days' advance written notice to a Licensee and the City of its need to occupy any licensed Duct or conduit, and shall propose that the Licensee take the first feasible action listed:

13.4.1 Pay revised Duct or conduit rent designed to recover the cost of

retrofitting the Duct or conduit with multiplexing, optical fibers, or other space-saving technology sufficient to meet the School District's space needs; or

13.4.2 Pay revised Duct or conduit rent based on the cost of new Ducts or conduits constructed to meet the School District's space needs; or

13.4.3 Vacate Ducts and conduits that are no longer surplus; or

13.4.4 Construct and maintain sufficient new ducts or conduits to meet the School District's space needs.

13.5 When two or more Licensees occupy a section of Conduit Facility, the last Licensee to occupy the Conduit Facility shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space-saving technology or construction of new conduit, all Licensees shall bear the revised cost equally.

13.6 All Attachments shall meet local, state, and federal clearance and other safety requirements, be properly grounded and anchored, and meet the provisions of contracts executed between the School District and the Licensee. The School District may, at its option, correct any Attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay the School District for any fines, fees, damages, or other reasonable costs the Licensee's Attachments cause the School District to incur.

13.7 The City may install or affix and maintain wires and equipment for Municipal Purposes within any of the School District's Surplus Ducts or Conduits as defined in this Section upon not less than thirty (30) days' written notice to the School District and in accordance with applicable federal laws, rules, and regulations. The City shall provide written notification to the School District indicating the date on which the City intends to abandon or otherwise discontinue the use of the School District's Surplus Ducts or Conduits. All work to affix or maintain City wires and equipment shall be performed by the School District, according to the City's written specifications and subject to approval by the City, and shall be performed at the City's expense for the School District's direct costs of material and labor. Any damage caused by the School District to the City's wires and equipment when following the procedure approved by the City shall be repaired at the expense of the City. In the event of an emergency requiring the City to obtain immediate access to the School District's Surplus Ducts or Conduits, as reasonably determined by the City, the thirty (30) day written notice requirement shall be waived. In the event of such an emergency, the City shall contact the School District, informing the School District of the emergency and the City's need for immediate access. If the School District does not provide personnel on site within four (4) hours of the request, the City shall have the right to access the Surplus Ducts or Conduits with its own personnel. If the City damages the School District's Facilities during such emergency access, the City shall be responsible for the repair of such damages and all of the costs thereof.

13.8 The value of the City's use of the School District's Surplus Ducts or Conduits shall not be deducted from the School District's fee or any other fees payable to the City.

SECTION 14. TEMPORARY RELOCATION AT THE REQUEST OF THIRD PARTIES.

Whenever it is necessary to temporarily relocate or rearrange any Facility of the School District to permit the passage of any building, machinery or other object, the School District shall perform the work upon thirty (30) business days' written notice from the Persons desiring to move the building, machinery or other object. The notice shall: (1) demonstrate that the third party has acquired any necessary permit from the City; (2) detail the route of movement of the building, machinery or other object; (3) provide that the Person requesting the temporary relocation shall be responsible for the School District's costs; (4) provide that the requestor shall indemnify and hold harmless the City and the School District from any and all damages or claims resulting either from the moving of the building, machinery or other object or from the temporary relocation of the School District Facilities; and (5) be accompanied by a cash deposit or other security acceptable to the School District for the costs of relocation. The cash deposit or other acceptable security shall be in an amount reasonably calculated by the School District to cover the School District's costs of temporary relocation and restoration. The School District may, in its sole discretion, waive the cash deposit or other acceptable security requirement.

SECTION 15. RIGHT-OF-WAY VACATION.

If any Right-of-Way or portion thereof used by the School District is vacated by the City during the term of this Agreement, the School District shall, without expense to the City, remove its Telecommunications System therefrom and restore, repair or reconstruct the Right-of-Way or portion thereof in as good or better condition as before the removal, unless the City Council specifically reserves to the School District the right to continue to use the vacated Right-of-Way. In the event of failure, neglect or refusal of the School District, after ninety (90) days' notice by the City, to restore, repair, reconstruct, improve or maintain such vacated Right-of-Way, the City may perform such work or cause such work to be performed. The direct, indirect, and consequential costs thereof, as a result of the School District's delay, as determined by the City Council, shall be entered in the Docket of City Liens against any property of the School District, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. In the event of vacation under this Section, the City shall cooperate with the School District to identify alternative locations within the Rights-of-Way for placement of the School District's Facilities.

SECTION 16. MAINTENANCE OF FACILITIES.

The School District shall be solely responsible for performing all required maintenance and improvements to its Telecommunications System and for installing all safeguards reasonably necessary to prevent injury to any Person, or to any publicly or privately own property, and the School District shall be solely responsible for all costs thereof. The School District shall be responsible, at its own expense, for repairing any trench settlement or other paving defect resulting from the installation of Facilities in the Rights-of-Way.

SECTION 17. DISCONTINUED USE OF FACILITIES.

Whenever the School District intends to permanently discontinue use of part or all its Telecommunications System, the School District shall submit a completed application to the City Engineer for approval, describing the Facility or Facilities involved and the date on which the School District intends to discontinue its use. The School District must remove the Facility or request that the City permit the Facility to remain in place, which permission shall *be in the sole discretion of the City*. If the School District is permitted to abandon its Facilities in place as evidenced by written consent from the City, the School District shall submit to the City a deed or other form of documentation acceptable to the City Attorney transferring ownership of such Facilities in the Rights-of-Way to the City. After the transfer of ownership is complete, the School District shall have no further obligation for the Facilities except as otherwise provided for in this agreement, including but not limited to, indemnifying the City for any claims, damages, or harm caused by Hazardous Substances as provided for in Section 10.3 and 18.4.

Notwithstanding the School District's request that any such Facility remain in place, the City Engineer may require the School District to remove the Facility from the Rights-of-Way, or modify the Facility, or a combination of both, in order to protect the public health and safety, or otherwise serve the public interest. The School District shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until the City consents to the School District's abandonment, or the School District removes or modifies the Facility as directed by the City Engineer, or until the rights to and responsibility for the Facility are accepted by another Person or entity having authority to construct and maintain such Facilities, the School District shall be responsible for all necessary repairs and relocations of the Facilities, as well as restoration of the Rights-of-Way, in the same manner and degree as if the Facilities were in active use. The School District shall also retain all liability for such Facilities.

SECTION 18. HAZARDOUS SUBSTANCES

18.1 The School District shall comply with all applicable state and federal laws, statutes, regulations and orders concerning hazardous substances relating to the School District's Telecommunications System in the Rights-of-Way. For purposes of this Section 18, "Hazardous Substance" shall have the meaning given by ORS 465.200(16).

18.2 Upon reasonable notice to the School District and in the presence of an authorized representative of the School District, the City may inspect the School District's Facilities in the Right-of-Way to determine if any release of Hazardous Substances has occurred, or may occur, from or related to the School District's Telecommunications System.

18.3 In removing or modifying any of its Facilities as provided in this Agreement, the School District shall also remove all residue of Hazardous Substances in compliance with applicable environmental clean-up standards related thereto.

18.4 City and the School District expressly acknowledge that the City shall have no liability whatsoever for any claims, damages or harm caused by or related to the existence or release of Hazardous Substances in or by the School District's Telecommunications System, or for the School District's failure to adequately address or clean up such Hazardous Substances.

The School District shall indemnify City for any claims, damages or harm according to the requirements of Subsection 10.3 of this Agreement.

SECTION 19. ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

19.1 This Agreement shall not be assigned nor any of the School District's Telecommunications System located in the Rights-of-Way be sold, mortgaged, assigned or otherwise transferred, without the prior written consent of the City, except to entities that control, are controlled by, or are under common control with, the School District. The School District shall notify the City of any proposed transfers to such entities no less than thirty (30) days in advance of such assignment or transfer. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance.

19.2 Nothing contained herein shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of the School District's Telecommunications System for the purpose of financing the acquisition of equipment for, or the construction and operation of, the School District's Telecommunications System without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights under this Agreement.

19.3 In determining whether the City will consent to any sale, lease, mortgage, assignment, merger or transfer of the School District's Telecommunications System, the City may inquire into the technical, legal, and financial qualifications of the prospective party with respect to its ability to perform under this Agreement, and the City may condition its consent upon satisfactory results of such inquiry. The School District shall assist the City with any such inquiry. The City shall not unreasonably delay or withhold its consent to any such sale, lease, mortgage, assignment, transfer or merger.

19.4 No sale, lease, mortgage, assignment, transfer or merger for which the City's consent is required may occur until the School District's successor, assignee or lessee has complied with the requirements of this Agreement, including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by official act.

19.5 Within ten (10) days after execution and delivery of any instrument so consented to by the City, the School District shall file with the City Recorder an executed counterpart or certified copy thereof.

SECTION 20. FORFEITURE AND REMEDIES; FORCE MAJEURE.

20.1 In addition to any other rights set out elsewhere in this Agreement, the City reserves the right to declare a forfeiture of this Agreement and all of the School District's rights arising hereunder, upon the occurrence of one or more of the following:

20.1.1 The School District violates any material provision of this Agreement;

20.1.2 The School District is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City;

20.1.3 There is a final determination that the School District has failed, refused, neglected or is otherwise unable to obtain or maintain any permit required by any federal or state regulatory body regarding the School District's operation of its Telecommunications System within the City;

20.1.4 The School District fails to complete construction of any approved Facilities for more than eighteen (18) months after approval, unless the City and the School District agree in writing to an extension for completion of such construction.

20.1.5 The School District becomes unable or unwilling to pay its debts or is adjudged bankrupt.

20.2 For purposes of this Section, the following provisions are, without limitation, material to this Agreement, thus allowing the City to exercise any of its rights under this Agreement:

20.2.1 The invalidation, failure to pay or any suspension of the School District's payments of fees to the City under this Agreement;

20.2.2 Any failure by the School District to submit to the City the annual written report and written declaration required by Section 6.1;

20.2.3 Any failure by the School District to provide or maintain the liability insurance required under this Agreement;

20.2.4 Any failure by the School District to post or maintain, through its contractor(s) any bond(s) and/or letter(s) of credit required under this Agreement;

20.2.5 Any failure by the School District to provide copies of requested information as required in subsection 6.3 or 11.1 of this Agreement; and

20.2.6 Any failure by the School District to otherwise fully comply with the requirements of this Agreement.

20.3 In addition to any rights set forth elsewhere in this Agreement, as well as its rights under the Salem Revised Code or any other law, the City reserves the right at its sole option to apply any of the following remedies, alone or in combination:

20.3.1 Impose a financial penalty of up to \$1,000.00 per violation of this Agreement;

20.3.2 Suspend the School District's Agreement rights until the School District corrects or otherwise remedies the violation;

20.3.4 The City Council may revoke this Agreement in the event that any

provision becomes invalid or unenforceable and the City Council expressly finds that such provision constituted a consideration material to the grant of the Agreement.

20.4 In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the Person or Persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.

20.5 The City shall give the School District thirty (30) days prior written notice of its intent to exercise its rights under this Section, stating the reason(s) for such action. If the School District fails to cure the stated reason within the thirty (30) day notice period, or if the School District does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, the City Council may impose any or all of the remedies available under this Section.

20.6 Force Majeure. In the event the School District's performance of any of the terms, conditions, obligations, or requirements of this Agreement is prevented or impaired by a cause or event beyond the School District's reasonable control, such inability to perform shall be deemed to be excused and no penalties or sanctions shall be imposed as a result thereof. For the purpose of this Subsection, causes or events not within the control of the School District shall include without limitation acts of God, strikes, sabotage, riots or civil disturbances, restraints imposed by order of a governmental agency or court, explosions, acts of public enemies, and natural disasters such as floods, earthquakes, landslides, and fires, but shall not include financial inability of the School District to perform or failure of the School District to obtain any necessary permits or licenses from other governmental agencies or the right to use the facilities of any public utility where such failure is due solely to the acts or omissions of the School District, or the failure of the School District to secure supplies, services or equipment necessary for the installation, operation, maintenance or repair of the Telecommunications System where the School District has failed to exercise reasonable diligence to secure such supplies, services or equipment.

SECTION 21. RENEGOTIATION.

If any provision of this Agreement becomes invalid or unenforceable and the City Council or the School District expressly finds that such provision constituted a consideration material to entering into this Agreement, the City and the School District may mutually agree to renegotiate the terms of this Agreement. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the party receiving the notification request accepts the offer to renegotiate, the Parties shall have ninety (90) days to conduct and complete the renegotiation.

SECTION 22. REMOVAL OF FACILITIES UPON EXPIRATION.

Upon expiration of this Agreement, the School District shall either remove its Facilities in accordance with ORS 221.470 or seek City's written consent to leave its Facilities in place pursuant to Section 17 of this Agreement.

SECTION 23. PUBLIC RECORDS

23.1 The School District acknowledges that information submitted to the City is open to public inspection under the Oregon Public Records Law, ORS 192.410 through 192.505. The School District acknowledges it is responsible for becoming familiar with, and understanding the provisions of the Oregon Public Records Law.

23.2 The School District may identify information, submitted to the City as confidential, such as trade secrets, financial records, customer information or technical information (as defined in ORS 192.501 or 192.502). The School District shall prominently mark any information for which it claims confidentiality with the word "Confidential" on each page of such information, prior to submitting such information to the City. The School District shall also provide a written explanation as to why such information is confidential under state or federal law. The City shall treat any information so marked as confidential until the City receives any request for disclosure of such information. City shall make reasonable efforts to provide the School District notice of a request for information marked as confidential, including a copy of the request, within ten (10) business days of receiving any such request. The School District shall have five (5) business days within which to provide a written response to the City before the City will disclose any of the requested confidential information. The City shall retain the sole discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

SECTION 24. CHOICE OF LAW; VENUE; NOTICE.

24.1 This Agreement shall be construed and interpreted according to the laws of the State of Oregon, without regard to choice of law considerations. Any litigation between the City and the School District arising under or regarding this Agreement shall occur, if in the state courts, in the Marion County Circuit Court, and if in the federal courts, in the United States District Court for the District of Oregon.

24.2 Any notice provided for under this Agreement shall be sufficient if in writing and: (1) delivered personally to the following addressee, (2) deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, (3) sent by overnight or commercial air courier (such as Federal Express), or (4) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to the City:

City Manager
City of Salem, Oregon
555 Liberty Street, SE, Room 220
Salem, OR 97301-3503
FAX # (503) 588-6354

With copies to: Franchise Administrator
City of Salem, Oregon
555 Liberty Street, SE, Room 220
Salem, OR 97301-3503

FAX # (503) 588-6251

City Attorney
City of Salem, Oregon
555 Liberty Street, SE, Room 205
Salem OR 97301-3503
FAX # (503) 361-2202

If to the School District: Chief Operations Officer
Salem-Keizer School District
Lancaster Professional Center
2450 Lancaster Dr. NE
Salem, OR 97305
Fax # 503-399-3407

Any such notice or communication delivered by personal delivery shall be deemed delivered and effective upon actual receipt. Any notice or communication sent by United States mail, postage prepaid, shall be deemed delivered and effective five (5) days after mailing. Any notice or communication sent by overnight or commercial courier shall be deemed delivered and effective five (5) days after dispatch. Any notice or communication sent by facsimile transmission shall be deemed delivered when receipt of the transmission is generated by the transmitting machine. To be effective against either party, such facsimile transmission shall be confirmed by telephone notice to the other party.

SECTION 25. PROVISION FOUND UNENFORCEABLE.

If any provision of this Agreement is found by a court of competent jurisdiction to be unenforceable, such provision shall not affect the other provisions, but such unenforceable provision shall be deemed modified to the extent necessary to render it enforceable, preserving to the fullest extent permitted the intent of the School District and the City as set forth in this Agreement.

SECTION 26. MERGER.

This Agreement, including any attachments and laws, rules and regulations incorporated herein or to which this Agreement is subject, constitutes the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements or representations, oral or written, not specified herein regarding this Agreement.

SECTION 27. WAIVER OF BREACH.

One or more waivers or failures to object by either party to the other's breach of any provision, term, condition, or covenant contained in this Agreement shall not be construed as a waiver of any subsequent breach, whether or not of the same nature.

SECTION 28. SIGNATURES.

The Parties, by their signatures below, acknowledge having read and understood this Agreement, and agree to be bound by its terms and conditions. The individual signing this Agreement on behalf of his or her respective party hereby certifies that such signature has been authorized by his or her party and that the individual has the authority to act on behalf of and to bind his or her party.

IN WITNESS WHEREOF the Parties have caused this Agreement to be signed in their respective names by their duly authorized representatives as of the dates set forth below.

SALEM-KEIZER SCHOOL DISTRICT 24J: CITY OF SALEM:

By: _____

Michael D. Wolfe

Chief Operations Officer

Dated: _____

By: _____

Steve D. Powers

City Manager

Dated: _____