

**BOARD OF REGENTS**  
EASTERN MICHIGAN UNIVERSITY

SECTION: 3
DATE: July 21, 2006

**RECOMMENDATION**  
**WASHTENAW WIRELESS MASTER PARTICIPATION AGREEMENT**

**ACTION REQUESTED**

It is recommended that the Board of Regents approve and authorize the administration to sign the proposed Master Participation Agreement between Washtenaw County and Eastern Michigan University (EMU).

**STAFF SUMMARY**

Washtenaw County (Washtenaw) has launched an initiative called "Wireless Washtenaw" with the goal of providing a wireless network for urban, suburban and rural settings throughout Washtenaw County. Pursuant to the initiative, Washtenaw is entering into contractual arrangements with governmental entities, universities, businesses and others within the County to provide access to and/or use of their lands, buildings, structures and other assets (Assets) by the wireless broadband Provider which will construct, operate and maintain the wireless network within the County. As consideration for use of their Assets, the participating governmental entities, universities, etc. are entitled to receive the benefits of the wireless network. The attached proposed Master Participation Agreement between Washtenaw and EMU sets forth in detail the terms and conditions relating to Washtenaw's and the Provider's access to specified EMU Assets and EMU's right to receive the benefits of the network once it has been activated. The proposed Agreement provides for an initial five-year contract term with an additional five-year renewal at Washtenaw's option. The Agreement would specifically identify the EMU Assets the selected Provider would have exclusive access to for wireless purposes (EMU would reserve the right to use these Assets for internal wireless purposes and for other purposes) during the term of the Agreement. The identified EMU Assets would be provided "as is", without warranty, and all construction, installation and maintenance would be performed at Provider's sole cost and expense. The Provider must agree to defend, indemnify and hold harmless EMU from any liability arising from its activities on EMU's property and/or its commercial activities, and further must maintain appropriate insurance that names EMU as an additional insured (EMU would also be required to maintain insurance on its Assets that are subject to the Agreement). EMU would reserve the right to terminate the Agreement early as to Washtenaw or any Provider if Washtenaw or the Provider commits a material breach of the contract. Further, Washtenaw and the wireless Provider must insure that their use of EMU Assets will not interfere with EMU's WEMU-FM transmissions and operations and/or EMU's internal wireless transmissions and operations. If such interference occurs, Washtenaw/Provider upon written request must promptly suspend their

operations until the interference has been eliminated or remedied. If the interference cannot be eliminated or remedied within 30 days, EMU may elect to terminate the Agreement. The proposed Agreement has been reviewed and approved as to legal form by EMU's Office of Legal Affairs. The proposed Agreement has also been reviewed by EMU's Information and Communications Technology Division (ICT) and by the Physical Plant Department.

To date, Master Participation Agreements have been approved by several cities, townships and villages within Washtenaw County, including the City of Ypsilanti, Ypsilanti Township, the City of Ann Arbor, Ann Arbor Township, Dexter Township, Scio Township. A recommendation to select a wireless broadband service Provider for the County is scheduled to be considered by the Washtenaw County Board of Commissioners on August 2, 2006.

### **FISCAL IMPLICATIONS**

None. While EMU would be committing to allow Washtenaw and the selected Provider of wireless services to use specified EMU Assets for an extended period of time, the proposed Agreement requires no monetary commitment by EMU.

### **ADMINISTRATION RECOMMENDATION**

The proposed board action has been reviewed and is recommended for Board approval.

University Executive Officer

Date

## **Master Participation Agreement**

- 1. Parties; Effective Date.** This Master Participation Agreement (“Agreement”) is between Washtenaw County, a Michigan municipal corporation (the “Governing Entity”) and the undersigned entity (“Participant”). This Agreement is effective on the date last signed by the parties (the “Effective Date”).
- 2. Nature of Agreement.**
  - 2.1 Governing Entity and others have launched an initiative called “Wireless Washtenaw” (the “Initiative”), with the goal of providing a wireless network for the urban, suburban and rural settings throughout Washtenaw County. The Initiative is more fully described in Schedule 1 to this Agreement.
  - 2.2 In connection with the Initiative, various governmental entities, universities, businesses and others within Washtenaw County have committed to provide access to and/or use of certain of their parcels of land, buildings, structures and other assets to the Governing Entity. In order to facilitate the progress of the Initiative and encourage Providers to provide the wireless network on beneficial terms, each such participant has or will execute a Master Participation Agreement with the Governing Entity, under which each participant will grant the Governing Entity all necessary leases, authorizations, licenses, rights and authority to permit the Governing Entity to enter into agreements with one or more wireless broadband providers (the “Providers”) to construct, operate and maintain the wireless network for the Initiative. This Agreement sets forth the terms and conditions under which Participant grants such rights to Governing Entity.
- 3. Participant Assets and Grant of Rights.**
  - 3.1 Participant is the owner of the parcels of land (“Land”), the buildings (“Buildings”), the structures (“Structures”), the networking equipment and infrastructure (“Network Infrastructure”) and the other assets described in Schedule 2 to this Agreement (collectively, the “Assets”). Additional Participant Assets may be added to this Agreement by written amendment to Schedule 2 agreed to between Participant and Governing Entity. In addition, after the wireless network for the Initiative is fully operational throughout Washtenaw County, Participant may remove Assets from Schedule 2 if they are not being utilized for the Initiative, provided that: (a) Participant gives Governing Entity not less than one hundred eighty days (180) prior written notice of its intent to remove such Assets; and (b) Participant reasonably considers any request by Governing Entity to have such Assets remain on Schedule 2 if Governing Entity perceives the need for such Assets.
  - 3.2 Subject to the terms and restrictions of Schedule 2 and this Agreement, Participant hereby grants to Governing Entity all rights, licenses, permissions, privileges, powers and authority necessary to license, lease and/or otherwise permit access to and use of the Assets, and any and all access and utility easements, by one (1) or more Providers for the installation, operation and maintenance of radio communications facilities, including without limitation an air conditioned equipment room in Buildings, utility lines,

transmission lines, electronic equipment, radio transmitting and receiving antennas and supporting equipment and structures thereto (collectively, "Facilities"), for use in the provision of wireless radio frequency communications services for the Initiative. In addition, Participant grants to Governing Entity, for the benefit of Providers, and their agents, employees, contractors, guests and invitees, a non-exclusive right and easement for pedestrian and vehicular ingress and egress and parking across that portion of the Assets described in Schedule 2.

- 3.3 Subject to the terms and restrictions of Schedule 2 and this Agreement, the rights granted in this Section 3 include, without limitation, the right for the Governing Entity to grant to Providers reasonable rights to do the following:
- (a) to enter upon and/or review and inspect the Assets for the purpose of making appropriate engineering and boundary surveys, inspections, soil test borings and other reasonably necessary tests;
  - (b) to enter upon the Assets for the purposes of constructing, operating and maintaining the Facilities; and
  - (c) to do all work necessary to prepare, maintain and alter the Assets for the Providers' business operations and to install transmission lines connecting the antennas to the transmitters and receivers.
- 3.4 The rights granted Governing Entity in this Section 3 to Participant's Assets are exclusive so long as the wireless network for the Initiative meets the minimum criteria set forth in Schedule 1. As such, Participant shall not license, lease or otherwise permit the access to and/or use of any of its Assets subject to this Agreement for wireless broadband services during the Term of this Agreement, including all Renewal Terms (defined below). Notwithstanding the foregoing, the restrictions of this Section 3.4 shall not apply to (a) any use of the Assets for wireless broadband services which pre-dates the Effective Date of this Agreement; and/or (b) any use of the Assets by Participant to establish a wireless broadband network for its own purposes.
- 3.5 Governing Entity shall enter into written agreements with each Provider on the Initiative (each a "Provider Agreement"). Each Provider Agreement will contain, at minimum, the following provisions:
- (a) that Participant is an express third party beneficiary of the Provider Agreement;
  - (b) that Provider is an express third party beneficiary of this Agreement;
  - (c) that Provider will indemnify and hold Participant harmless against all third party claims arising out of or related to Provider's Facilities, any damage caused to any Assets by Provider's Facilities, and/or Provider's rights and obligations under the Provider Agreement and this Agreement;
  - (d) a waiver of subrogation in Participant's favor;

- (e) that Provider acknowledges that all Assets are being provided by Participant in their “as is” physical condition without representations or warranties, express or implied, as to the physical condition thereof;
- (f) a representation and warranty that, to the best of Provider’s knowledge, that Provider’s Facilities and any other equipment used by that Provider does not pose a health risk to the occupants of the Assets or the surrounding community;
- (g) that, in order to further assure Participant that: (i) the Facilities will be properly removed, and that the Assets shall be restored and returned to Participant in accordance with the terms of this Agreement; and (ii) that the Provider pays all costs and expenses of work done or caused to be done by Provider on the Assets (collectively, the “Obligations”), Provider shall deposit with Participant, prior to the effective date of the Provider Agreement, a surety bond in the amount of twenty thousand dollars (\$20,000.00) as security for completion of the Obligations. The bond shall be issued by a surety and in a form acceptable to Participant;
- (h) that Provider will, during the Term of this Agreement, including Renewal Terms:
  - (i) comply with all applicable laws, ordinances, rules and regulations relating to the use of the Assets;
  - (ii) conduct its business, and its use of the Facilities and the Assets, so as not to create any nuisance, interfere with Participant in its management and use of the Assets and/or interfere with the use of the Assets by other licensees, lessees or other users of the Assets; provided that such management and uses of the Assets pre-date that of the Facilities;
  - (iii) install, operate and maintain the Facilities in compliance with all Federal Communications Commission (“FCC”) requirements and the terms of all applicable Provider’s FCC licenses; and
  - (iv) install, operate and maintain the Facilities in a manner that does not create extraordinary fire hazards or result in an increased rate of insurance on the Assets or their contents;
  - (v) maintain Facilities in good repair, and timely repair any damage to the Facilities, subject to the terms of this Agreement;
  - (vi) not use, generate, store or dispose of any Hazardous Material on, under, about or within any Land, without Participant’s prior written consent. As used in this Section, “Hazardous Material” shall mean petroleum or any petroleum product, asbestos, any substance known by the State of Michigan to cause cancer and/or reproductive toxicity, and/or any substance, chemical or waste that is identified as hazardous, toxic or dangerous in any applicable federal, state or local law or regulation; and

- (vii) comply with all applicable environmental statutes, regulations and rules regarding its use of the Assets, including but not limited to statutes, regulations and rules regarding radiofrequency radiation. Without limiting or modifying the foregoing, Provider shall measure baseline radiofrequency radiation before any installation work is started, and shall measure radiofrequency radiation after installation of its Facilities.
- 3.6 No Provider Agreement may create liabilities or responsibilities on behalf of Participant, which are not set forth in this Agreement.
- 3.7 Governing Entity may only exercise the rights of Section 3 for the purposes of the Initiative, and all rights not granted to Governing Entity are retained by Participant.
- 4. Construction and Maintenance of Facilities.**
- 4.1 Participant agrees to cooperate with Governing Entity and each Provider, at Governing Entity's and/or a Provider's expense, in making applications for and obtaining all licenses, permits and any and all other necessary approvals that may be required for the intended use of the Assets under this Agreement. Plans for the initial installation will be submitted by Providers to Participant, and approval of such plans will not to be unreasonably conditioned, delayed or withheld. If any conditions, delays and/or disapprovals of any plans are unacceptable to a Provider or the Governing Entity, or if the Participant merely refuses to approve any plans, then Governing Entity shall have the right to terminate this Agreement upon written notice to Participant. Nothing in this Section requires Participant to approve any plans.
- 4.2 All construction and installation work shall be performed at the Providers' sole cost and expense and in a good and workmanlike manner. Title to the Facilities shall be held by Providers. All of Facilities shall remain Providers' personal property and are not fixtures. Providers shall remove all Facilities at its sole expense on or before the expiration or earlier termination of this Agreement; provided, Providers timely repair any damage to the Assets caused by such removal and restore the Assets to the condition existing on the effective date of the Provider Agreement, reasonable wear and tear excepted. In the event that Providers fails to remove the Facilities within thirty (30) days of the expiration or earlier termination of this Agreement, Participant may remove or store the Facilities, at Providers' expense. If Providers or Providers' financing entity fails to claim and remove the Facilities within thirty (30) days following receipt of written notice from Participant, Participant shall be entitled to dispose of the Facilities in any manner which it deems fit.
- 4.3 Any future changes or alterations of the Facilities (including installation of any antenna or other improvements) will be submitted for review to the Participant, and approval of such changes or alterations will not to be unreasonably conditioned, delayed or withheld. Participant shall use its best efforts to review and either approve or disapprove of any proposed changes or alterations within ten (10) business days after receipt of the requested change or alteration. If Participant does not provide such approval, disapproval or request for changes within a reasonable time period, Participant shall be deemed to have rejected the requested change or alteration. If any conditions, delays and/or



disapprovals of any requested changes or alterations are unacceptable to a Provider or the Governing Entity, or if the Participant merely refuses to approve any requested change or approval within a reasonable time period, then Governing Entity shall have the right to terminate this Agreement upon written notice to Participant. Nothing in this Section requires Participant to approve any requested changes or alterations to the Facilities of any Provider. .

- 4.4 Providers, Providers' employees, agents, subcontractors, lenders and invitees shall have access to the Assets as described herein, except for emergency access, which may occur as described herein; provided the Providers, Providers' employees, agents, subcontractors, lenders and invitees comply with any restrictions contained in Schedule 2 and/or this Agreement.
- 4.5 To the extent under the control of Participant: (a) Participant shall maintain all access roadways from the nearest public roadway to the Assets in a manner sufficient to allow pedestrian and vehicular access at all times under normal weather conditions, and Governing Entity acknowledges that the current access road is adequate for its and all Providers' needs; and (b) Participant shall be responsible for maintaining and repairing such roadway to keep it in substantially the same condition as on the Effective Date of this Agreement, at no cost to Governing Entity and/or any Provider, except for any damage caused by Governing Entity's and/or Providers' use of such roadways. Notwithstanding the foregoing, Participant shall not be deemed in violation of this Section if any roadway(s) is under construction or otherwise not available for use, in which case Participant shall reasonably cooperate with Governing Entity and/or each effected Provider to provide access to the Assets.
- 4.6 Unless agreed to in writing by Participant, nothing in this Agreement permits any Provider to store any vehicles and/or other equipment on any Assets, except for the Facilities and any ancillary equipment permitted by Participant as part of the initial installation process.

## **5. General Obligations of the Parties.**

- 5.1 Any access to the Assets shall be only upon receipt of permission from Participant, and at no cost to Participant, with the understanding that Participant shall respond within two (2) days of said request (except in the case of emergencies, when Participant shall permit access to the Assets within twenty-four (24) hours of said request).
- 5.2 Participant shall at all times maintain the Assets in good repair so as not to unreasonably prohibit Governing Entity's and/or any Provider's use of the Assets. Neither Governing Entity nor any Provider shall be required to make any repairs to Assets unless such repairs shall be necessitated by reason of the default or neglect of Governing Entity and/or the applicable Provider. Upon expiration or termination hereof, Governing Entity and/or Providers shall restore the Assets to the condition in which they existed upon the effective date of the Provider Agreement, reasonable wear and tear and loss by casualty or other causes beyond Governing Entity's and/or the applicable Provider's control excepted.

- 5.3 Participant represents, warrants and agrees: (a) that to the best of Participant's knowledge, Participant has not used, generated, stored or disposed of, or permitted the use, generation, storage or disposal of, any Hazardous Material on, under, about or within any Land in violation of any law or regulation, and (b) that Participant will not, and will not permit any third party to use, generate, store or dispose of any Hazardous Material on, under, about or within any Land in violation of any law or regulation.
- 5.4 Governing Entity and/or Providers shall repair any damage to the Assets caused by any legally required or other reasonable testing conducted by Governing Entity and/or any Providers. Upon request, Governing Entity and/or each Provider shall provide Participant with copies of test and inspection results. The results of all tests shall be deemed confidential information of the Governing Entity and shall not be revealed by Governing Entity, Providers and/or Participant to any third party, except their contractors, employees and agents, unless such Governing Entity, Providers and/or Participant is required to disclose such test results by law or legal process.
- 5.5 All construction activities on the Assets shall be performed by licensed and bonded contractors from 7 a.m. to 6 p.m., Monday through Friday, unless otherwise agreed to by Participant. Governing Entity, each Provider and/or their contractors shall timely repair any damage to the Assets caused by construction activities. If Governing Entity and/or Providers fail to commence repairs of any damage within ten (10) days after receipt of written notice from Participant, Participant may undertake such repairs and the amount paid for the repairs shall be paid by Governing Entity and/or the Providers to Participant within ten (10) days after delivery of the invoice for such work to Governing Entity.
- 5.6 Providers shall pay for the electricity they consume in their operations. To the extent reasonably practical, each Provider shall obtain, at its sole cost, separate utility service from any utility company that will provide service to the Facilities (including a standby power generator for each Provider's exclusive use) and will be billed directly for use of the utilities. Participant agrees to sign such documents or easements as may be required by said utility companies to provide such service to the Assets, including the grant to each Provider or to the servicing utility company at no cost to each Provider or Participant, of an easement in, over across or through the Assets as required by such servicing utility company to provide utility services as provided herein, with the understanding that such easement shall not interfere with Participant's continued use of the Assets for their intended purpose. Any easement necessary for such power or other utilities will be at a location acceptable to Participant and the servicing utility company. In the event it is not reasonably practical for a Provider to obtain separate utility service from a utility company for one or more Facilities, then Participant agrees to use reasonable efforts to provide such utility service to Provider at rates agreed to between Participant and the applicable Provider.
- 5.7 Except as otherwise provided herein, subsequent to the installation of the Facilities, Participant shall not permit itself, its lessees or licensees to install new equipment on the Assets or property contiguous thereto owned or controlled by Participant, if such equipment causes or is reasonably likely to cause interference with a Provider's operations. Should such interference occur, Participant, Governing Entity and the



applicable Provider shall agree upon a commercially reasonable alternative for the Provider to avoid such interference.

- 5.8 Governing Entity and Provider shall not use the Assets and/or its Facilities in any way which interferes with Participant's WEMU-FM transmissions and operations and/or Participant's internal wireless transmissions and operations. Further, Governing Entity and Provider shall not use the Assets and/or its Facilities in any way which interferes with the transmissions and operations of tenants or licensees of Participant with agreements/leases with Participant that pre-date the Effective Date of this Agreement. If such interference occurs, Governing Entity and/or Provider will, upon Participant's written request, promptly suspend its operations until said interference has been eliminated or remedied. If such interference, as specified herein, cannot be abated within thirty (30) days from said notice, Participant may elect to terminate this Agreement by providing Governing Entity and Provider with written notice of termination.
- 5.9 Participant waives any lien rights it may have concerning the Facilities, which are Providers' personal property and not fixtures, and Providers have the right to remove the same at any time without Participant's consent, subject to Providers' repair and restoration obligations described herein.
- 5.10 Participant shall be responsible for compliance with all marking and lighting requirements of the Federal Aviation Administration ("FAA") resulting from the height and location of any Asset. Should Participant be cited because any Asset is not in compliance and, should Participant fail to cure the conditions of noncompliance, Governing Entity may terminate this Agreement without further liability on thirty (30) days prior written notice if the noncompliance is not cured within sixty (60) days of receipt of written notice of noncompliance. Each Provider shall be responsible for compliance with all marking and lighting requirements of the FAA and the FCC which may be occasioned by the installation or operation of the applicable Provider's Facilities on or at the Assets. Should a Provider be cited because any Asset is not in compliance, Governing Entity may terminate this Agreement without further liability on thirty (30) days prior written notice, or cure the noncompliance at its and/or the applicable Provider's sole expense, provided that Participant shall have the right to approve any required changes or modifications to the Assets, at its sole discretion, within five (5) business days of submission of any plans for such changes or modifications.
- 5.11 Governing Entity shall not permit any mechanic's liens to be filed against any portion of the Assets for any work performed, materials furnished or obligations incurred by or at the request of Governing Entity and/or any Provider. If such a lien is filed, then Governing Entity shall, within thirty (30) days after Participant has delivered notice of the filing to Governing Entity, either pay the amount of the lien or diligently contest such lien and deliver to Participant a bond or other security reasonably satisfactory to Participant. If Governing Entity fails to timely take either such action, then Participant may pay the lien claim without inquiry as to the validity thereof, and any amounts so paid, including expenses and statutory interest, shall be paid by Governing Entity to Participant within ten (10) days after Participant has delivered to Governing Entity an invoice therefor.

6. **Warranty of Title and Quiet Enjoyment.** Participant warrants that: (a) Participant owns the Assets in fee simple and/or otherwise has rights of access thereto sufficient to grant Governing Entity and Providers the rights set forth herein; (b) Participant has full right to make and perform this Agreement; and (c) Participant covenants that upon Governing Entity and each applicable Provider observing and performing all the terms, covenants and conditions on Governing Entity's and/or the applicable Provider's part to be observed and performed under this Agreement and Governing Entity's Provider Agreement with the applicable Provider, Governing Entity and the applicable Provider may peacefully and quietly enjoy the Assets.
7. **Destruction or Condemnation.** If the Assets or Facilities are damaged, destroyed, condemned or transferred in lieu of condemnation, Governing Entity may elect to terminate this Agreement as of the date of the damage, destruction, condemnation or transfer in lieu of condemnation by giving notice to Participant no more than forty-five (45) days following the date of such damage, destruction, condemnation or transfer in lieu of condemnation.
8. **Closure/Demolition.** Upon sixty (60) days' notice to Governing Entity, Participant may abandon or cease operations at any of the Assets (a "Closure"). After a Closure of any of the Assets, Governing Entity shall be permitted to continue to access the Assets in accordance with the terms of this Agreement. However, after a Closure, Participant shall have no obligation to maintain the Assets and shall not be liable to Governing Entity and/or any Provider for any vandalism or damage to the Facilities. Further, upon six (6) months' prior written notice to Governing Entity, Participant may elect to demolish the building in which Assets are located in order to construct a new facility. Upon receipt of such notice, the applicable Provider must, at its sole cost, remove the Facilities from the Assets as soon as possible, but no later than six (6) months after receipt of the notice. If demolition of the building is to occur during the last three (3) years of this Agreement (factoring in all permitted Renewal Terms), then this Agreement shall be deemed terminated as to the applicable Asset(s) upon Governing Entity's receipt of the notice. Otherwise, this Agreement shall remain in full force and effect and the applicable Provider shall be permitted to reinstall the Facilities in the new building at a mutually acceptable location and subject to plans and specifications approved by Participant. Further, during the time the new building is being constructed, the applicable Provider shall be permitted to install a temporary cell on wheels ("COW") or other similar facility, including a crank-up (i.e. telescoping) tower at a mutually acceptable location on the Asset in order to continue its use of the site.
9. **Insurance.**
  - 9.1 Each Provider, at that Provider's sole cost and expense, shall procure and maintain with respect to the Assets and the Facilities commercial general liability insurance, including contractual liability, at a combined single limit for bodily injury and property damage of at least four million dollars (\$4,000,000.00) per occurrence and maintain on the Facilities all risk, full replacement value, property damage insurance, which limits may be met by using any combination of general liability insurance and umbrella or other form of excess liability limit. Such liability insurance shall insure, on an occurrence basis, against

liability of the Provider, its employees and agents arising out of or in connection with the Provider's use of the Assets and its contractual obligations hereunder, all as provided for herein.

- 9.2 Participant, at Participant's sole cost and expense, shall procure and maintain reasonable insurance coverage for the Assets to cover bodily injury and property damage. Such insurance shall insure, on an occurrence basis, against liability of Participant, its employees and agents arising out of or in connection with Participant's use, occupancy and maintenance of the Assets. All or some of such insurance coverage may be through self-insurance, subject to the reasonable approval of Governing Entity.
- 9.3 Participant and each applicable Provider shall be named as an additional insured on the other's policy. Participant and each Provider shall provide to the other a certificate of insurance evidencing the coverage required by this paragraph within thirty (30) days of prior to effective date of the Provider Agreement. Each insurance certificate shall provide for thirty (30) days notice of cancellation, except for non-payment of the premium, which notice shall be ten (10) days. Providers and Participant shall use insurance companies with a rating of B+ or better, unless they are self insured.
- 9.4 Providers' required insurance policy shall name Participant as additional named insured parties (the "Insured Parties"). For claims arising out of the Providers' operations or liabilities hereunder, Providers' insurance shall provide primary coverage to Participant when any policy issued to Participant provides duplicate or similar coverage, and in such circumstance, Participant's policy will be excess over Providers' policies. For claims arising out of the Participant's operations, Participant's insurance shall provide primary coverage to Providers when any policy issued to Providers provide duplicate or similar coverage, and in such circumstances, Providers' policies will be excess over Participant's policy. Further, all contractors hired by Providers and Participant shall maintain workers' compensation insurance containing a waiver of subrogation endorsement reasonably acceptable to Participant and Providers, respectively.

## **10. Term and Termination.**

- 10.1 The term of this Agreement shall be five (5) years commencing on the Effective Date (the "Term") unless otherwise terminated as provided in this Agreement.
- 10.2 Governing Entity shall have the right to unilaterally extend the Term for one (1) five (5) year period (the "Renewal Term") on the same terms and conditions as set forth herein. This Agreement shall automatically be extended for the Renewal Term unless Governing Entity notifies Participant of its intention not to renew prior to commencement of the succeeding Renewal Term.
- 10.3 In addition to the termination rights set forth elsewhere in this Agreement, this Agreement may be terminated in accordance with the following provisions:
  - (a) each party may terminate this Agreement if the other party commits a material breach of this Agreement and fails to correct such breach within thirty (30) days of its receipt of written notice of the breach from the non-breaching party;

- (b) Participant may terminate this Agreement as to any Provider if the Provider commits a material breach of this Agreement and fails to correct such breach within thirty (30) days of its receipt of written notice of the breach from Participant, which notice must be given to Governing Entity and the applicable Provider;
  - (c) Participant may terminate this Agreement upon written notice to Governing Entity at the end of the eighteenth (18<sup>th</sup>) month after the Effective Date of this Agreement if Governing Entity has not (i) entered into any Provider Agreement(s) with any Provider(s) for use of any Assets for the Initiative; and/or (ii) if the wireless network under the Initiative is not fully operational throughout Washtenaw County;
  - (d) Participant may terminate this Agreement upon written notice to Governing Entity if this Agreement has not been assigned to an Operating Entity (defined below) within twelve (12) months after Effective Date of this Agreement;
  - (e) each party may terminate this Agreement upon written notice to the other party in the event the Initiative and/or the Providers' construction, operation and/or maintenance of their Facilities for the Initiative is rendered illegal by any federal and/or State of Michigan law or regulation;
  - (f) this Agreement shall automatically terminate as to any Provider if the Provider Agreement between Governing Entity and such Provider expires without renewal and/or is terminated by either Governing Entity or Provider; and/or
  - (g) Governing Entity may terminate this Agreement without any cause or reason upon ninety (90) days prior written notice to Participant.
- 10.4 Upon termination of this Agreement, the parties will reasonably cooperate with each other regarding the winding down of their relationship under this Agreement.

## **11. Compensation and Taxes.**

- 11.1 Participant understands and agrees that, except as expressly provided herein, it is not entitled to, nor shall it receive, any compensation, rent or other remuneration under this Agreement, and that there shall be no fees or assessments charged to Governing Entity or any Provider for the rights granted herein, except for personal property taxes on Facilities if Participant is a unit of government with the legal authority to so tax the Facilities. However, once the wireless network under the Initiative has been activated, Participant and its constituents shall be entitled to receive the benefits of the network in accordance with the provisions of the Provider Agreement(s) between Governing Entity and the applicable Provider(s). In addition, the Governing Entity and Providers may provide Participants, on a case-by-case basis, with discounted and/or free additional services to Participants, although such discounted and/or free additional services shall be provided at the discretion of the Governing Entity and the Providers and may not be decided upon and/or granted until after the wireless network under the Initiative has been activated. Participant will also be reimbursed for reasonable out-of-pocket costs and expenses



incurred by Participant in connection with providing Governing Entity and/or Providers access to the Assets.

- 11.2 Participant may assess personal property taxes on a Provider's Facilities if Participant is a unit of government with the legal authority to so assess such taxes. Regardless, if personal property taxes are assessed against Participant, and Participant is not exempt from such taxes, Governing Entity and/or Providers shall pay any portion of such taxes directly attributable to the Facilities. Except as provided immediately below, Participant shall pay all real property taxes, assessment and deferred taxes on the Assets. If any increase to Participant's real property taxes is the direct result of the location of the Facilities on the Assets, then Governing Entity and/or the applicable Provider shall reimburse the Participant that proportionate share of such tax increase; provided that as a condition of Governing Entity's and Provider's obligation to pay such tax increases that: (a) Participant immediately provides to Governing Entity the documentation from the taxing authority, reasonably acceptable to Governing Entity, indicating that the increase is due to the Facilities, but only if such information is available from the taxing authority; and (b) Participant files a timely protest with the appropriate taxing authority (but only to the extent a good faith basis exists for the protest) and consents to Governing Entity's and/or the applicable Provider's intervention and prosecution of the same (the cost of such appeal to be borne by Governing Entity and/or the applicable Provider). Participant shall cooperate with Governing Entity and/or the applicable Provider in the protest of such assessment by: (i) providing information regarding the relative valuation of the property; and (ii) allowing Governing Entity and/or the applicable Provider to participate in any proceeding related to the tax protest. Nothing in this Section shall be construed as limiting either party's right to contest, appeal or challenge any tax assessment.

## **12. Assignment and Subletting.**

- 12.1 Except as expressly provided in Section 3 above, and in Section 12.2 below, Governing Entity may not assign, sublet (including by way of co-location agreements) or otherwise transfer all or any part of its interest in this Agreement or in the Assets without the prior written consent of Participant; provided, however, that Governing Entity may permit a Provider to assign its interest in any Provider Agreement with the Governing Entity to its parent company, any subsidiary or affiliate of it or its parent company, or to any successor-in-interest or entity acquiring fifty-one percent (51%) or more of its stock or assets, subject to any financing entity's interest, if any, in such Provider Agreement. Except as provided herein, Participant may not assign, sublet (including by way of co-location agreements) or otherwise transfer all or any part of its interest in this Agreement or in the Assets without the prior written consent of Governing Entity. Participant may, without the prior written consent of Governing Entity: (a) assign or transfer all, but not part, of its interests in an Asset; provided such assignment or transfer is made expressly subject to the terms of this Agreement; and/or (b) assign this Agreement, in whole, but not in part, to any affiliated entity, provided such affiliated entity agrees in writing to be bound by this Agreement.
- 12.2 The parties acknowledge and agree that the use of the Governing Entity as the initial contracting entity with Participants and Providers is designed to expedite the Initiative,



and that the parties desire to have the Governing Entity subsequently assign this Agreement in whole to a governing authority, consortium or other operating entity (the "Operating Entity"). Governing Entity may assign this Agreement, in whole but not in part, without Participant's consent, to any such Operating Entity. Upon the effective date of such assignment, Governing Entity shall be fully relieved and released of any and all further rights and obligations under this Agreement.

- 12.3 Notwithstanding anything to the contrary contained in this Agreement, each Provider will be given the right to assign, mortgage, pledge, hypothecate or otherwise transfer without consent its interest in its Provider Agreement with the Governing Entity to any financing entity, or agent on behalf of any financing entity to whom the applicable Provider: (a) has obligations for borrowed money or in respect of guaranties thereof; (b) has obligations evidenced by bonds, debentures, notes or similar instruments; and/or (c) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof.

### **13. Liability and Indemnity.**

- 13.1 Participant acknowledges and agrees that Governing Entity shall not be liable, accountable or responsible in any way for any acts, omissions and/or breaches of this Agreement by any Provider, including such Provider's employees, agents, representatives and contractors, and that Participant's sole and exclusive remedy in connection therewith will be an action or claim directly against the applicable Provider under this Agreement and/or under the Provider Agreement between Governing Entity and Provider. However, nothing in this Section 13.1 shall limit Participant's rights to terminate this Agreement as to any Provider in accordance with the provisions of Section 9 above.
- 13.2 Participant shall not be liable to any Provider, the Governing Entity or those claiming by, through or under Governing Entity for any injury to or death of any person or the damage to or theft, destruction, loss of use of any property or inconvenience caused by casualty, theft, fire, third parties or any other matter (including losses arising through repair or alteration of any part of the Assets or failure to make repairs, or from any other cause), except to the extent caused by Participant's gross negligence, recklessness and/or intentional misconduct.
- 13.3 To the extent permitted by applicable law, Provider and Governing Entity (each an "Indemnitor") shall, at its sole expense: (i) defend any third party claim, demand and/or suit ("Claim") against Participant (the "Indemnitee") alleging and/or arising out of the following, and (ii) shall indemnify and hold Indemnitee harmless from and against any and all losses, liabilities, damages, fines, penalties, costs, expenses and/or fees (including reasonable attorneys' fees) awarded or assessed against Indemnitee in connection with the Claim, or reached through a negotiated settlement of the Claim:
- (a) that Indemnitor, its employees, agents, representatives, or contractors was negligent or committed an intentional act that caused injury to a person or damage to property, or failed to comply with any applicable law, statute, regulation or ordinance;

- (b) Indemnitor's breach of this Agreement, including, without limitation, any representation or warranty set forth in this Agreement; and/or
  - (c) any damage to any Asset caused by a Provider and/or by a Provider's Facilities.
- 13.4 In order to receive indemnification under this Section, Indemnitee must give Indemnitor prompt written notice of the Claim; permit Indemnitor to exercise sole control over the defense and/or settlement of the Claim; and cooperate with Indemnitor, at Indemnitor's expense, in the investigation, defense and/or settlement of the Claim. This Section 12 sets forth each party's sole indemnification rights and indemnification remedies in connection with the Claims described herein.
- 14. Limitations of Liability.**
- 14.1 Except as expressly provided herein, in no event shall Governing Entity be liable to Participant in connection with this Agreement and/or the Initiative, regardless of the form of action or theory of recovery, for any: (a) indirect, special, exemplary, consequential, incidental or punitive damages, even if that party is aware of the possibility of such damages; (b) lost profits, lost revenues, lost business expectancy, business interruption losses and/or benefit of the bargain damages; and/or (c) direct damages in an amount in excess of one hundred thousand dollars (\$100,000).
- 14.2 Except as expressly provided herein, in no event shall Participant be liable to Governing Entity and/or any Provider in connection with this Agreement and/or the Initiative, regardless of the form of action or theory of recovery, for any: (a) direct, indirect, special, exemplary, consequential, incidental or punitive damages, even if that party is aware of the possibility of such damages; and/or (b) lost profits, lost revenues, lost business expectancy, business interruption losses and/or benefit of the bargain damages. Governing Entity and each Provider's sole remedies against Participant for Participant's breach of this Agreement shall be termination of this Agreement in accordance with the provisions of Section 10 above and/or an action for equitable remedies.
- 14.3 Notwithstanding the foregoing, the limitations of Sections 14.1 and 14.2 shall not apply to Governing Entity's indemnification obligations under this Agreement and/or either party's gross negligence, recklessness and/or intentional misconduct, except as provided below in Section 14.4.
- 14.4 Notwithstanding any other provisions of this Agreement, including, without limitation, the provisions of Section 13, if Participant and/or Governing Entity is a unit of government, nothing in this Agreement constitutes a limitation or waiver of any governmental immunity provided by applicable law. All applicable laws related to governmental immunity shall govern over any conflicting or inconsistent term of this Agreement, and any unit of government shall be entitled to the full benefits and protections of such laws.

**15. Miscellaneous.**

- 15.1 This Agreement, all Schedules, and any addenda thereto, contain the entire understanding of the parties with respect to the subject matter addressed herein and supersede, replace and merge all prior understandings, promises, representations and agreements, whether written or oral, relating thereto. This Agreement may not be modified except by a writing signed by both parties. Except as expressly provided herein, the remedies accorded the parties under this Agreement are cumulative and in addition to those provided by law, in equity or elsewhere in this Agreement.
- 15.2 Any waiver of a party's right or remedy related to this Agreement must be in writing, signed by that party to be effective. No waiver shall be implied from a failure of either party to exercise a right or remedy. In addition, no waiver of a party's right or remedy will effect the other provisions of this Agreement.
- 15.3 Neither party shall be responsible or liable for any delay or failure in performing its obligations under this Agreement if such delay or failure is the direct result of causes outside of that party's reasonable control, including, without limitation, power outages, accidents, strikes, fires, war or acts of God; provided that such party uses best efforts to resume performance of its obligations as soon as practically possible.
- 15.4 This Agreement shall be governed by the laws of the State of Michigan (exclusive of its choice of law rules), and the federal laws of the U.S. The parties agree that any litigation arising between the parties in relation to this Agreement shall be initiated and maintained in the Circuit Court of the County of Washtenaw, Michigan, or the U.S. District Court for the Eastern District of Michigan, Southern Division, except where exclusive jurisdiction of the dispute resides in the Michigan Court of Claims, and the parties hereby irrevocably submit to the exclusive jurisdiction and venue of such courts.
- 15.5 If any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, such provision will be enforced to the fullest extent that it is valid and enforceable under applicable law. All other provisions of this Agreement shall remain in full force and effect.
- 15.6 All notices must be in writing and sent to the individual who executed this Agreement on the other party's behalf, either by hand delivery; messenger; certified mail, return receipt requested; overnight courier; or by facsimile or by e-mail (with a confirming copy by regular mail) and shall be effective when received by such party at the address listed herein or other address provided in writing.

**[Signature Page Follows]**

**AGREED AND ACCEPTED:**

**Washtenaw County**

By: \_\_\_\_\_  
(Signature)

Name: \_\_\_\_\_  
(Printed)

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

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

\_\_\_\_\_  
(Participant's Full Legal Name)

By: \_\_\_\_\_  
(Signature)

Name: \_\_\_\_\_  
(Printed)

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

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(Participant's Contact Information)