**IRU AGREEMENT**

This IRU Agreement (“**Agreement**”) is made and entered into as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2010 (“**Effective Date**”) by and between the Board of Trustees of the University of Arkansas, acting for and on behalf of the University of Arkansas, Fayetteville, specifically the Arkansas Research and Education Optical Network, a consortium of Arkansas's public four-year universities with offices located at 155 Razorback Road, Fayetteville, AR 72701 ("**Customer**") and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“**Provider**”). Provider and Customer may also be referred to as the “Parties” or “Party” as the context allows.

**RECITALS**

Provider has constructed a continuous fiber optic communication system between the Provider city pairs identified in **Exhibit A**, which is attached hereto and incorporated herein by this reference (“**Provider System Route**”).

Customer desires to establish the terms and conditions under which Customer will have the right to use certain fiber(s) (“**IRU Fibers**”) and associated property in Provider’s fiber optic system.

Accordingly, in consideration of the mutual promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. **Defined Terms.** The following defined terms shall have the meanings ascribed to them below and shall apply to not only this Agreement but also to any attachments.

“**Acceptance Date**” means the date when all Segments to the Provider Fibers in the Provider System have been accepted.

“**Commercial Entities**”means persons or entities engaged in the buying, selling, or production of goods and/or services for profit.

“**Dark Fiber**” means a number of optical Fibers within optical Fiber cable(s) owned or controlled by Provider (“**Provider Cable**”), normally expressed in number of optical Fiber strands, unless otherwise stated, between two specified locations or end points (“**Provider Dark Fiber End Points”**) that have no optical electronics attached to any such optical Fiber strands.

“**Deposit**” means a cash deposit, irrevocable letter of credit and/or individual guaranty, or other form of security in form and amount acceptable to Provider.

“**Dispute**” means all controversies or claims arising out of or relating to this Agreement, including any breach or billing dispute.

“**Equipment**” means facilities or equipment provided, owned or installed by Customer in or on the Provider Cable.

“**Fiber**” means a glass strand or strands which is/are protected by a color coded buffer tube and which is/are used to transmit a communication signal in the form of pulses of light.

“**Indefeasible Right of Use**” **or** “**IRU**”means the exclusive, unrestricted and indefeasible right to use specified Provider Fibers for any legal purpose. The granting of such IRU does not convey title or legal ownership of any fibers or equipment on the Provider Network. The granting party shall have no right to revoke or restrict in any manner or to any degree whatsoever, through injunctive relief or otherwise, the use of the Right of Use granted to Customer.

**"Maintenance Window"** or **"MW"** means a prearranged period of time reserved for performing certain work on the Provider System Route that may potentially impact traffic. Generally, this will be restricted to weekends, avoiding the first and last weekend of each month and high traffic weekends.

**"POP"** means a point of presence or terminal.

“**Provider Cable**” means a cable of one or more Fiber optic strands owned or controlled by Provider, identified on **Exhibit A** attached hereto.

“**Provider Dark Fiber End Point**” means the specific location where each end of the Provider Dark Fiber strands provided under this Agreement will be spliced or otherwise interconnected with Customer-owned or Customer-leased fiber optic Equipment and/or fiber cabling.

 “**Provider Fiber(s)”** means a Fiber optic strand owned or controlled by Provider, identified on the **Exhibit A** attached hereto.

“**Provider System**”means the fiber optic communications system operated by Provider, as such system exists now, and as it is modified from time to time.

“**OTDR**” or Optical Time Domain Reflectometer means the optical Fiber test instrument capable of measuring loss characteristics and displaying faults, splices, and other Fiber events in single mode and multimode optical Fibers.

“**Telecommunications Services**” means the transmission of voice, data, video, image signals or other electronic information between or among points specified by the user without change in the content or form of the information as sent and received.

**"Underlying Rights"** shall mean the rights of third parties who have granted rights to Provider through deeds, leases, easements, rights of way, licenses, franchises, permits and other rights, titles, or interests as obtained by Provider for the construction, installation, operation, maintenance, and repair of the Provider System Route.

1. **Grant of Rights in the Provider System**
	1. Provider hereby grants to Customer, on the terms and conditions contained herein, an exclusive and indefeasible right of use of \_\_\_\_ fibers in the Provider System between the city pairs identified in **Exhibit A**.
	2. Provider hereby grants to Customer, on the terms and conditions contained herein, a nonexclusive right to use the tangible and intangible property needed for the use of the Provider Fibers (collectively the “**Associated Property**”), including but not limited to:
		1. Provider’s rights in all Underlying Rights;
		2. Access to Provider’s support structures including any regeneration, amplifier, junction and terminals of POPs; and
		3. Collocation space within Provider’s POP sites.
	3. Provider grants the IRU for the Term (as defined in Section 6 below) on the terms and subject to the covenants and conditions set forth in this Agreement. The IRU shall be exclusive as to the Provider Fibers, and nonexclusive as to the Associated Property. The IRU does not include the right of the Customer to own, control, maintain, modify or revise the Provider Fibers, or Associated Property, or the right to encumber in any manner, or other use of the Provider System except as expressly set forth herein.
2. **IRU Fees**

3.1 In consideration of the grant of the IRU hereunder by Provider to Customer, and other good and valuable consideration, the sufficiency of which is acknowledged, Customer agrees to pay to Provider within sixty (60) days of the Acceptance Date and upon receipt of a properly itemized and properly submitted invoice from Provider to Customer the following sums:

* 1. A one-time non-recurring fee of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_ for the IRU; and

 b. $\_\_\_\_\_\_\_\_\_\_\_\_\_\_ for network preparation of the fiber optic cable containing the

 Provider Cables described in 2.1 above.

3.2 Except for taxes or assessments based on Provider net income, ad valorem, personal, and real property taxes imposed on Provider property, Customer shall be solely responsible for payment of all sales, use, personal property, gross receipts, excise, access, bypass, franchise, value added, communications, Universal Service Fund, or other local, state and federal taxes, fees, charges, or surcharges, however designated, imposed by any domestic or international government entity on or based upon the provision or use of Provider’s Dark Fiber pursuant to this Agreement, provided that Provider provides Customer with reasonable notice and description of any such taxes, fees, charges or surcharges so that Customer may challenge the applicability of any such taxes, fees, charges or surcharges, if necessary.

3.3 Customer may dispute any invoice in good faith but must timely pay the entire undisputed portion of the invoice in full and submit a documented claim for the disputed amount setting forth specific reasons therefore. All claims must be submitted to Provider within forty-five (45) days of the due date. If Customer does not submit a claim within such period and in the manner stated above, then such invoice shall be deemed to be correct and Customer waives all rights to dispute such charges.

# **4. Acceptance and Testing of the IRU Fibers**

4.1 Customer, upon receipt of OTDR test results for the IRU Fibers, in accordance with the standards set forth on **Exhibit B** attached hereto, shall have fifteen (15) working days to review the testing results and shall either give Provider written notice of acceptance thereof ("Acceptance") or reject the test results and specify parts not in accordance with the standards criteria. Failure of Customer to review and either accept or reject the test results within the applicable time limits (15 working days) shall operate as constructive acceptance of the test results for purposes of Acceptance in this Agreement. If any portion of the IRU Fibers does not conform to the standards criteria, and Provider fails to remedy all defects or failures within forty-five (45) days after receiving notice from Customer of rejection, then at Customer’s option and upon written notice from Customer, Provider shall return to Customer any previous payments and this Agreement shall terminate, with no further obligations or penalties to Customer.

 4.2 Upon acceptance of the IRU Fibers as set forth herein, Customer may request Provider to splice Customer’s Fibers at the Provider Dark Fiber End Points, or as otherwise requested by the Customer at any time thereafter. All splicing shall be performed by Provider or a contractor operating under the direction of Provider, and shall be billed to Customer as set forth in **Exhibit C** hereto

# **5. Term and Renewal**

5.1 The grant of the IRU herein shall become effective on the "Effective Date", and shall exist for the Term of twenty (20) years. At the expiration or other termination of this Agreement, the IRU shall immediately terminate, and all rights of Customer to use the Associated Property, or any part thereof, shall cease.

5.2 It is understood and agreed that Provider must and does maintain legal title to the entire Provider System, subject to the Customer IRU, hereunder.

5.3 Customer may renew this Agreement for an additional twenty-year term. Customer may request renewal of the Agreement by giving Notice to Provider not more than 120 days or less than sixty (60) days prior to the expiration date of the Term. Such Renewal is to be subject to the renewal terms specified in **Exhibit A**.

# **6.** **Network Access: Regeneration Facilities**

6.1 Provider shall provide Customer with access to the Provider System Route and its respective IRU Fibers in the Provider’s System. In order for the Provider to be in compliance with permitting agency requirements, its personnel must be on site to allow the Customer access to the Provider System Route. Such access shall be granted upon reasonable advance notice to the Provider for the sole purpose of activities conducted as a part of this Agreement. Customer agrees to pay Provider all reasonable costs associated with providing access to the Provider System Route. Provided, however, that access to Provider’s equipment and facilities located within the POP site locations described in 2.1 and 3.1 shall be governed by a separate mutually acceptable collocation agreement.

6.2 If Customer requires connecting points on the Provider System Route in addition to those currently provided for on the Provider System Route, the parties will negotiate in good faith for the construction and installation of such additional connecting points, subject to the terms and conditions of this Agreement.

6.3 All connections and access to the Provider System Route on behalf of Customer shall be performed by Provider in accordance with Provider’s applicable specifications and operating procedures. The cost of connections to such additional connecting points will be borne by Customer. It is the responsibility of Customer to obtain all governmental and other approvals and consents necessary for any such connections or access to the Provider System Route.

6.4 Customer shall pay Provider’s reasonable Costs for each connection within thirty (30) days of the date of receipt of the Provider’s invoice therefor. In order to schedule a connection of this type, Customer shall request and coordinate such work not less than ninety (90) days in advance of the date the connection is requested to be completed. Such work will be restricted to a Maintenance Window, unless otherwise agreed to in writing for specific projects. Customer shall have no limitations on the types of electronics or technologies employed to utilize the IRU Fibers in Provider’s System, subject to Provider’s safety procedures and so long as such electronics or technologies do not interfere with the use of or present a risk of damage to any portion of Provider’s System. All access to and right of way permitting for any regeneration site or other facility necessary to operate the IRU Fibers shall be the sole responsibility of the Customer.

6.5 Unless otherwise provided for herein, Customer shall be responsible for obtaining and maintaining its own optical amplifier, regeneration, junction, POP and terminal sites along the Provider System Route, at its sole cost and expense.

# **7. Maintenance and Repair of the Provider System Route**

7.1 From and after the Acceptance Date, the maintenance of the Provider System Route shall be provided by Provider in accordance with the maintenance requirements and procedures set forth in **Exhibit C** hereto. Provided, however, at any time after five (5) years from and after the Acceptance Date, either party may delegate these duties to a competent third party (“Service Provider”) of its selection and under the terms of **Exhibit C** and upon written notice to the other party. Such other agreements shall insure the performance of maintenance of the Provider System Route in accordance with the procedures set forth in **Exhibit C** hereto. Customer agrees to reimburse the Service Provider for any maintenance requirements associated with the IRU Fibers or the Associated Property as provided for in this Agreement.

 7.2 Repairs and adjustments for outages of Affected Services shall be governed by **Exhibit C** hereto.

# **8. Permits: Underlying Rights: Relocation**

8.1 Provider acknowledges that it has obtained certain rights of way for construction and operation of the Provider System Route (the "Underlying Rights"). The IRU is subject to the terms of the Underlying Rights, and subject to the terms under which the right of way is owned or held by the grantor of the Underlying Rights, including, but not limited to, covenants, conditions, restrictions, easements, reversionary interests, bonds, mortgages and indentures, and other matters, whether or not of record, and to the rights of tenants and licensees in possession. The IRU granted hereunder is further subject and subordinate to the prior right of the grantor of the Underlying Rights to use the right of way for other business activities, and to the prior right of the Provider to use its rights granted under the Underlying Rights. The rights granted herein are expressly made subject to each and every limitation, restriction or reservation affecting the Underlying Rights. Nothing herein shall be construed as a representation, warranty or covenant of Provider’s right, title or interest with respect to the right of way or the Underlying Rights.

8.2 Upon the expiration or other termination of an Underlying Right that is necessary in order to grant, continue or maintain an IRU granted hereunder in accordance with the terms and conditions hereof, Provider shall use all reasonable efforts to obtain an alternate right of way. The parties shall share the costs of obtaining an alternate right of way in the manner described in Section 9.4, below.

8.3 If, after the Acceptance Date for any Segment of the Provider System Route, the Provider reasonably determines, or is required by a third party with legal authority to so require (including, without limitation, the grantor of an Underlying Right), to relocate any portion of the Segment of the Provider System Route, including any of the facilities used or required in providing the IRU, Provider shall proceed with such relocation, including, but not limited to, the right, in good faith, to reasonably determine the extent of, the timing of, and methods to be used for such relocation; provided that (a) any such relocation shall be constructed and tested in accordance **Exhibit B** and with prevailing industry standards; and (b) if the relocation is at such Provider’s determination, it shall not adversely affect the operations, performance, connection points with Customer’s network or connecting points with the Provider System Route.

8.4 The costs of obtaining alternate right of way as described in Section 9.2, and the costs of relocation described in Section 9.3, shall be allocated between the parties in the following manner:

(a) First, if the affected portion of the Segment includes any facilities other than the IRU Fibers, the total Costs shall be allocated equally among all of the facilities on a pro-rata basis provided however, that if either Provider or Customer is entitled to special rentals or other exemptions from a public agency the entity entitled to such special treatment shall be accorded the same treatment for purposes of the allocation of cost and;

(b) Second, the Costs related to the IRU Fibers, plus the Costs specifically related to the Segment of the Provider System Route shall be allocated between Provider and Customer based on the ratio to which the number of IRU Fibers in the Segment bears to the total number of fibers in the affected portion of the Segment of the Provider System Route.

8.5 The Provider shall deliver to the Customer updated Route Drawings with respect to the relocated segment not later than ninety (90) days following the completion of such relocation.

8.6 The Provider will use reasonable efforts to obtain Underlying Rights that have a stated term of not less than twenty (20) years from the Acceptance Date for the entire Segment of the Provider System Route.

# **9. Operation and Use of the Provider System Route**

9.1 The requirements, restrictions, and/or limitations on Customer’s right to use the IRU Fibers and Associated Property, and safety, operational and other rules and regulations imposed in connection with, the Underlying Rights are referred to collectively as the "Underlying Rights Requirements."

9.2 Customer represents, warrants and covenants that it will use the IRU Fibers and Associated Property in compliance with and subject to the Underlying Rights Requirements and all applicable government codes, ordinances, laws, rules and regulations.

9.3 Provider agrees and acknowledges that it has no rights to use the IRU Fibers during the Term hereof, and from and after the Effective Date, shall keep the IRU Fibers and the IRU in the Associated Property granted hereunder, free from (a) any liens of any third party attributable to Provider, and (b) any rights or claims of any third party attributable to Provider. Provider shall obtain from any entity in favor of which a security interest or lien on all or part of the Segment of the Provider System Route a written nondisturbance agreement substantially to the effect in which such lienholder acknowledges the Customer’s rights and interests in and to the IRU Fibers and the Associated Property and the IRU hereunder, and agrees that the Customer shall not be diminished, disturbed, impaired or interfered with in any adverse respect by such lien holder.

9.4

(a) Provider will provide the IRU Fibers requested by Customer for the use of educational services and research programs, and for other purposes. Provider understands, and Customer agrees it will not resell or lease any of the Provider Fibers, Provider System Route or network capacity under this Agreement to another entity, subject to Customer’s express purposes of expanding a network designed to share educational research and development (including, but not limited to Internet 2 and/or the National Lambda Rail applications) with other institutions of higher education, public agencies, and private research partners, to facilitate other University educational and business functions, and for other purposes.

 (b) Customer agrees and acknowledges that it has no right to use any other fibers in the Provider System Route other than the IRU Fibers. Customer shall keep any and all of the Provider System Route free from any liens, rights or claims of any third party attributable to the Customer, except that Customer may encumber the IRU granted in the IRU Fibers and such Customer’s interest in Associated Property, on the condition that Customer shall provide to the Provider an agreement from any such lien holder that the interest of any lien holder is subordinate to the interest of Provider and other interests and rights in and to the IRU Fibers and the Associated Property.

9.5 Provider and Customer shall promptly notify each other of any matters pertaining to, or the occurrence (or impending occurrence) of, any event which would be reasonably likely to give rise to any damage or impending damage to or loss of the Provider System Route that are known to such party.

9.6 Customer shall not use the Provider System in a way that interferes in any way with or adversely affects the use of the fibers or cable of any other person using the Provider System Route. Provider shall not use and shall prohibit third parties from using the Provider System Route in a manner that interferes in any way with or adversely affects Customer’s use of the IRU Fibers or Associated Property. **The parties acknowledge the PRovider System Route includes or will include other participants, including the parties hereto, and other owners and users of telecommunication systems.**

9.7 Provider and Customer each agree to cooperate with and support the other in complying with any requirements applicable to their respective rights and obligations hereunder.

9.8 All ownership rights and title in all the Fibers provided by Provider hereunder shall at all times remain exclusively with Provider. Provider is hereby authorized to file a precautionary financing statement covering the Lease Fiber as provided in the Uniform Commercial Code, for its ultimate protection and use.

# **10. Claims**

10.1 Subject to the provisions of Sections 10 and 15, herein, Provider hereby agrees to indemnify, defend, protect and hold harmless Customer and its employees, officers and directors, from and against, and assumes liability for all suits, actions, damages or claims or any character (a) brought because of any injuries or damage received or sustained by any persons or property which in whole or in part arise on account of the acts or omissions of Provider in the performance of its obligations under this Agreement; and (b) under the workers compensation laws, except to the extent caused by the negligence or willful misconduct of the parties indemnified hereunder.

10.2 Subject to the provisions of Sections 10 and 15, with respect to all suits, actions, damages or claims or any character against Provider, and its employees, officers and directors (a) brought because of any injuries or damage received or sustained by any persons or property which in whole or in part arise on account of the acts or omissions of Customer in the performance of its obligations under this Agreement, and (b) under the workers compensation laws, except to the extent caused by the negligence or willful misconduct of Provider, and its employees, officers and directors. Customer agrees with Provider that: (a) It will cooperate with Provider in the defense of any action or claim brought against Provider seeking the foregoing damage or relief; (b) It will in good faith cooperate with Provider should Provider present any claims of the foregoing nature against Customer to the Claims Commission of the State of Arkansas; (c) It will not take any action to frustrate or delay the prompt hearing on claims of the foregoing nature by the said Claims Commission and will make reasonable efforts to expedite said hearing; provided, however, Customer reserves its right to assert in good faith all claims and defenses available to it in any proceeding in said Claims Commission or other appropriate forum. Notwithstanding the foregoing, nothing in this Agreement shall be deemed or construed as a waiver of any immunity to suit legally available to Customer.

10.3 Nothing contained herein shall operate as a limitation on the right of either party hereto to bring an action for damages against any third party, including indirect, special or consequential damages, based on any acts or omissions of such third party as such acts or omissions may affect the operation or use of the Provider System Route or the IRU Fibers, except as may be limited by Underlying Rights Requirements; provided, however, that each party hereto shall assign such rights or claims, execute such documents and do whatever else may be reasonably necessary to enable the other party to pursue any such action against such third party.

# **11. Limitation of Liability**

11.1 Notwithstanding any provision of this Agreement to the contrary, except to the extent caused by its willful misconduct, neither party shall be liable to the other party for any special, incidental, indirect, consequential or punitive damages, whether foreseeable or not, arising out of, or in connection with, such party's performance of its obligations under this Agreement.

11.2 Subject to all other terms and conditions of this Agreement, the maximum liability to Customer, if any, of Provider, or its affiliates in connection with this Agreement shall be limited, in the aggregate, to the amount of any IRU Fees that have been paid by Customer to Provider with respect to the affected portion of the Provider System Route of which the claim is based on and at the time the claim is made (unless the failure persistently, materially and substantially degrades the overall utility of Provider’s System under this Agreement and the parties are unable to identify and implement a mutually acceptable work-around), provided, however, that this limitation of maximum liability shall not apply to damages arising from the willful misconduct of Provider or its affiliates; and provided further, that this limitation shall not restrict either party's right to proceed for injunctive relief.

**12. Insurance**

12.1 Following the Acceptance Date, and throughout the remaining term of the IRU, Provider shall procure and maintain in force, at its own expense:

(a) not less than $4,000,000 combined, single limit liability insurance, on an occurrence basis, for personal injury and property damage, including, without limitation, injury or damage arising from the operation of vehicles or equipment and liability for completed operations;

(b) workers' compensation insurance in amounts required by applicable law and employers' liability insurance with a limit of at least $1,000,000 per occurrence;

(c) automobile liability insurance covering death or injury to any person or persons, or damage to property arising from the operation of vehicles or equipment, with limits of not less than $4,000,000 per occurrence; and

(d) any other insurance coverage specifically required of such party pursuant to either party’s right-of-way agreements with third parties.

12.2 Customer shall, at its own expense, procure and maintain following the

Acceptance Date, and throughout the remaining term of the IRU, the following insurance and “self insurance”:

1. Customer, as an agency of the State of Arkansas, is “self-insured” for

workers’ compensation through the State’s self insured workers’ compensation program. Claims are made to the Public Employee Claims Division (PECD) and paid/denied according to State law.

1. Automobile Liability insurance for owned, hired and non-owned autos in the

amount of $1,000,000 combined single limit for bodily injury/property damage.

1. Other claims for loss, expense, damage, or liability for alleged personal

injuries or property damage arising from work performed under this Agreement may be presented to the Arkansas State Claims Commission. However, nothing in this Agreement shall be deemed or construed as a waiver of any immunity to suit legally available to Customer.

12.3 If coverage is denied or reimbursement of a properly presented claim is disputed by the carrier for insurance provided above, the party carrying such coverage shall make good faith efforts to pursue such claim with its carrier.

# **13. Taxes, Fees and other Governmental Impositions**

13.1 The parties acknowledge and agree that it is their mutual objective and intent to (a) minimize the aggregate taxes, fees, and other government impositions (“Impositions”) payable with respect to the Provider System Route, and (b) share such Impositions according to their respective interests in the Provider System Route. They agree to cooperate with each other and coordinate their efforts to achieve such objectives in accordance with the provisions of this Section.

13.2 Provider shall be responsible for and shall timely pay any and all Impositions with respect to the operation of the Provider System Route which Impositions are (a) imposed or assessed prior to the Acceptance Date; or (b) that were assessed in return for the original right to install the Segment of the Provider System Route on public property or in public right of way.

13.3 Except as to Impositions described in section 14.2, following the Acceptance Date Customer shall be responsible for and shall pay all Impositions (a) imposed on, based on, or otherwise measured by the gross receipts, gross income, net receipts or net income received by or accrued to Customer with respect to the use of the IRU Fibers; or (b) which have been separately assessed, allocated to, or imposed on the IRU Fibers.

(a) To the extent such Impositions are not separately assessed, allocated to or imposed on the IRU Fibers, Provider will pay all such Impositions. Provider shall notify Customer of such Imposition, and Customer shall promptly reimburse Provider for the IRU Holder’s share of all such Imposition.

(b) "Customer’s Share" shall mean the Customer’s pro rata share of such Impositions based on the relative number of fibers used by Customer compared with the total number of fibers in the affected portion of the Provider System Route during the relevant tax period; provided, however, that if Provider is entitled to special treatment or exemptions from any Impositions, it shall be entitled to take full advantage of such special treatment or exemptions for purposes of determining the Customer’s share and Customer shall have no right to claim any benefit to such special treatment or exemption.

13.4 Provider shall have the right to contest any Imposition (including by nonpayment of such Imposition). The out-of-pocket costs and expenses (including reasonable attorneys' fees) incurred by Provider in any such contest shall be shared by Provider and Customer in the same proportion as to which the parties would have shared in such Impositions as they were assessed. Any refunds or credits resulting from a contest brought pursuant to this Section shall be divided between Provider and Customer in the same proportion as separately determined or as originally assessed. In any such event, Provider shall provide timely notice of such challenge to Customer.

13.5 Customer shall have the right to protest by appropriate proceedings any Imposition. In such event, Customer shall be responsible for its own expense, legal action or cost, including reasonable attorneys' fees, resulting from Customer’s exercise of its rights hereunder.

(a) The foregoing notwithstanding, Provider, at its option and at its own expense, shall have the right to direct and manage any contest regarding an Imposition that relates to a portion of the Provider System Route that affects the interest of Provider; subject, however, to reasonable and appropriate consultation with Customer. Customer agrees to cooperate with Provider in any such contest.

13.6 Provider and Customer agree to cooperate fully in the preparation of any returns or reports relating to the Impositions. Provider and Customer further acknowledge and agree that the provisions of this Section are intended to allocate the Impositions on procedures and methods of computation that are in effect on the date of this Agreement. Material changes in such procedures and methods could significantly alter the fundamental economic assumptions of the parties underlying this Agreement. Accordingly, the parties agree that, if such procedures or methods of computation change materially, the parties will negotiate in good faith an amendment to this Section to preserve, to the extent reasonably practicable, the economic intent and effect of this Section.

# **14. NOTICES**

All legal notices to be sent to a party pursuant to this Agreement shall be in writing and deemed to be effective upon (i) personal delivery, (ii) three (3) business days after mailing via certified mail return receipt requested if mailed within the domestic U.S., or (iii) on the day when the notice has been sent by facsimile if sent during business hours with fax confirmation received and followed by private courier, or express mail priority, next-day delivery. The Full Business Address for purposes of notice under this Section as well as telephone voice and facsimile numbers shall be:

If to PROVIDER: PROVIDER

And a copy to:

If to Customer: University Of Arkansas

 ARE-ON

 155 S Razorback Rd.

 Fayetteville, AR 72701

 Telephone: (479) 575-3301

 Facsimile: (479) 575-4753

With a copy to: University of Arkansas for Medical Sciences

 Office of the General Counsel

 4301 W. Markham Street, Slot #860

 Little Rock, AR 72212

 Telephone: (501) 686-7608

 Facsimile: (501) 686-7736

# **15. CONFIDENTIALITY**

15.1 This Agreement and all materials, maps, and other documents which are marked confidential and disclosed by one party to the other in fulfilling the provisions and intent of this Agreement, are and shall be **confidential**.

 (a) Neither party shall divulge or otherwise disclose the provisions of this Agreement to any third party without the prior written consent of the other party, except that either party may make disclosure to those required for the implementation of this Agreement, and to customers and prospective customers, purchasers and prospective purchasers, auditors, attorneys, financial advisors, lenders and prospective lenders, investors and prospective investors, provided that in each case the recipient agrees in writing to be bound by the confidentiality provisions set forth in this section. In addition, either party may make disclosure as required by a court order or as otherwise required by law, including, but not limited to, the Arkansas Freedom of Information Act, or in any legal or arbitration proceeding relating to this Agreement. If either party is required by law or by interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process to disclose the provisions of this Agreement or the design information referred to in this Section, it will provide the other party with prompt prior written notice of such request or requirement so that such party may seek an appropriate protective order and/or waive compliance with this Section. The party whose consent to disclose information is requested shall respond to such request, in writing, within five (5) working days of the request by either authorizing the disclosure or advising of its election to seek a protective order, or if such party fails to respond within the prescribed period the disclosure shall be deemed approved.

(b) Nothing herein shall be construed as granting any right or license under any copyrights, inventions, or patents now or hereafter owned or controlled by either party.

(c) Upon termination of this Agreement for any reason or upon request of the party owning the confidential information, the other party shall return all Confidential Information, together with any copies of same, to Provider. The requirements of confidentiality set forth herein shall survive return of such Confidential Information.

(d) Neither party shall, without first obtaining written consent of the other party, use any trademark or trade name of the other party or refer to the subject matter of this Agreement or the other party in any promotional activity or otherwise, nor disclose to others any specific information about the subject matter of this Agreement. Neither party shall issue any publication or press release relating directly or indirectly to this Agreement without the prior written consent of both parties except as may be required by public regulatory agencies in which case the party making such release shall use its best efforts to inform the other party of the content of the press release.

(e) Further, upon Provider’s prior written agreement, Customer may publicly disclose general information including, but not limited to, the existence, term and total cost (but not an itemization of costs or charges under this Agreement) of any services received under this Agreement as a part of its efforts to establish a statewide computing network within the State of Arkansas.

15.2 The provisions of this Section shall survive expiration or other termination of this Agreement.

# **16. DEFAULT**

16.1 A default under this Agreement shall occur:

(a) in the case of a failure to pay any amount within 60 days of the date due under this Agreement, a party continues to fail to pay such amount within twenty (20) days after written notice to Customer specifying such breach, or

(b) in the case of any other material breach of this Agreement, a party fails to cure such within sixty (60) days after notice specifying such breach, provided that if the breach is of a nature that cannot be cured within sixty (60) days, a default shall not have occurred so long as the breaching party has commenced to cure within said time period and thereafter diligently pursues such cure to completion; or

16.2 If the default consists of a failure of Customer to pay any part of the IRU Fee, and the Acceptance Date has not yet occurred, Provider may terminate any and all of its obligations hereunder this Agreement, and apply any and all amounts previously paid by Customer hereunder toward the payment of any other amounts then or thereafter payable by Customer hereunder. In the event of any other default hereunder, the nondefaulting party may avail itself of one or more of the following remedies: (1) take such actions as it determines, in its sole discretion, to correct the default; and (2) terminate this Agreement; and (3) pursue any legal remedies it may have under applicable law or principles of equity, including specific performance, provided, however, that nothing in this Agreement shall be deemed or construed as a waiver of any immunities to suit legally available to Customer.

16.3 A waiver by either party at any time of any of its rights as to anything herein contained shall not be deemed to be a waiver of any breach of covenant or other matter subsequently occurring.

# **17. TERMINATION**

This Agreement shall automatically terminate upon the expiration or termination of the Term of this Agreement, or earlier as provided in this Agreement. Upon the expiration of the Term or other termination of this Agreement, the IRU shall immediately terminate and, subject to Section 14.5(b), all rights of Customer to use the IRU Fibers and the Associated Property shall cease. Upon termination, all rights to the IRU Fibers shall revert to Provider, and Provider shall owe Customer no further duties or consideration. Customer shall promptly remove all of its electronics, equipment, and other property from the affected Segment of the Provider System Route and any related facilities at its sole cost and under such Provider’s supervision. Termination of this Agreement shall not affect the rights or obligations of either party that have arisen before the date of termination or expiration.

# **18. FORCE MAJEURE**

If either party’s performance of this Agreement or any obligation hereunder is prevented, restricted or interfered with by causes beyond its reasonable control including, but not limited to, acts of God, fire, flood, explosion, vandalism, cable cut, power outage, storm or other similar occurrence including rain fade or other atmospheric conditions, any law, order, regulation, direction, action or request of any government, or of any department, agency, commission, court, bureau, corporation or other instrumentality of any one or more of said governments, shortages or unavailability or other delay in delivery not resulting from the responsible party’s failure to timely place orders, lack of or delay in transportation, delays in the issuance of appropriate permits or clearances as may be required by government codes, law and regulations, or of any civil or military authority, or by national emergencies, insurrections, riots, wars, acts of terrorism, strikes, lockouts or work stoppages or other labor difficulties, supplier failures, shortages, breaches, delays or failure of a third party to grant or recognize an Underlying Right (provided that Provider has made timely and reasonable commercial efforts to obtain the same), then the party that is unable to perform or meet its obligations due to such causes shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction or interference. The party that is unable to perform or meet its obligations due to such causes shall use commercially reasonable efforts under the circumstances to avoid and remove such causes of non‑performance and shall proceed to perform with reasonable dispatch whenever such causes cease.

# **19. ASSIGNMENT AND TRANSFER RESTRICTIONS**

19.1 The IRU Agreement. Except as provided in this Section, neither party hereto may transfer or assign all or any part of its interest under this Agreement, or delegate any duties, burdens, or obligations arising hereunder, without the other party’s written consent, which consent shall not be unreasonably withheld. A transfer or assignment in violation of this Section shall constitute a material breach of this Agreement. If any such consent is given, the original party hereto nevertheless shall remain fully and primarily liable for all obligations under this Agreement. An assignment of substantially all of the assets of either party, or an assignment of 50% or more of the stock of either party shall be deemed to be a transfer hereunder requiring consent by the other party. Nothing in this section shall be construed to restrict the sale of telecommunications circuits or capacity to either party’s third party Customers in the ordinary course of its carrier business.

19.2 Exceptions.

(a) Affiliates. The foregoing notwithstanding, either party may, without the prior consent of, but on notice to the other party, assign this Agreement, or assign or lease all or part of the IRU Fibers, to an affiliate, parent, or to any company into which such assigning party may be merged or consolidated, or that acquires substantially all of the assets of such party. An "affiliate" shall mean any corporation which, directly or indirectly, controls or is controlled by or is under common control with a party hereto, or a successor corporation by merger, consolidation, or nonbankruptcy reorganization. For purpose of the definition of "affiliate," the word "control" (including "controlled by" and "under common control with") means, with respect to any corporation, partnership, or association, possession, directly or indirectly, of the power to direct or cause the direction of the management and policy of a particular corporation, partnership or association, whether through the ownership of voting securities or by contract or otherwise.

(b) Financing. Either party shall have the right, without the other party’s consent, to assign or otherwise transfer this Agreement as collateral to any institutional lender (or institutional lender to any permitted transferee or assignee) subject to the prior rights and obligations of the parties hereunder; provided that the assignee or transferee in any such circumstance shall continue to be subject to all of the provisions of this Agreement, including without limitation this Section, except that any lender shall not incur any obligations under this Agreement, nor shall it be restricted from exercising any right of enforcement or foreclosure with respect to any related security interest or lien, so long as the purchaser in foreclosure is subject to the provisions of this Agreement, including, without limitation, the restrictions on transfer set forth in this Section.

# **20. REPRESENTATIONS, WARRANTEES AND ACKNOWLEDGMENTS**

20.1 By execution of this Agreement, each party represents and warrants to the other:

(a) The representing party has full right and authority to enter into and perform this Agreement in accordance with the terms hereof and thereof, and that by entering into or performing this Agreement, the representing party is not in violation of its charter or bylaws, or any law, regulation or agreement by which it is bound or to which it is subject;

(b) The execution, delivery and performance of this Agreement by such party has been duly authorized by all requisite corporate action, that the signatories for such party hereto are authorized to sign this Agreement, and that the joinder or consent of any other party, including a court or trustee or referee, is not necessary to make valid and effective the execution, delivery and performance of this Agreement by such party.

20.2 Provider further warrants and represents that, upon the date of Acceptance,

Provider shall have acquired all Underlying Rights necessary for the continuous operation and maintenance of the Provider System Route to enable Customer to use the IRU Fibers and Associated Property.

20.3 PROVIDER **warrantS and representS that THE INSTALLED IRU FIBERS will operate consistent with industry standards and will meet the technical standards agreed to in this agreement.** SUBJECT TO ALL OTHER TERMS AND CONDITIONS OF THIS AGREEMENT, PROVIDER DOES NOT MAKE ANY WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE IRU FIBERS AND ASSOCIATED PROPERTY OR FACILITIES, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE OR USE, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED. THE WARRANTIES SET FORTH IN THIS AGREEMENT CONSTITUTE THE ONLY WARRANTEES MADE WITH RESPECT TO THIS AGREEMENT AND ARE MADE IN LIEU OF ALL OTHER WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED. IN ADDITION, PROVIDER DOES NOT MAKE ANY WARRANTY OR REPRESENTATION OF ANY TYPE CONCERNING THE INTEGRITY OR PERFORMANCE OF ANY EQUIPMENT OR MATERIALS FURNISHED BY PROVIDER.

20.4 Provider will assign to Customer all manufacturers' warranties that pertain to the IRU Fibers, to the extent that they are assignable.

# **21. GENERAL**

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

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

21.3 Governing Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Arkansas without regard to choice of law principles. Any legal proceedings under this Agreement shall be conducted in the State of Arkansas.

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

(a) Unless expressly defined herein, words having well known technical or trade meanings shall be so construed. All listing of items shall not be taken to be exclusive, but shall include other items, whether similar or dissimilar to those listed, as the context reasonably requires.

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

(c) Nothing in this Agreement is intended to provide any legal rights to anyone not an executing party of this Agreement.

(d) This Agreement has been fully negotiated between and jointly drafted by the parties.

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

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

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

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

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

21.9 Counterparts. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

In confirmation of their consent and agreement to the terms and conditions contained in this IRU Agreement and intending to be legally bound hereby, the parties have executed this IRU Agreement as of the date first above written.

PROVIDER

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

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

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

 Board of Trustees of the University of Arkansas, acting for and on behalf of the University of Arkansas, Fayetteville, specifically the Arkansas Research and Education Optical Network

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

Name: \_Ann Kemp\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_Vice President for Finance & Administration

**EXHIBIT A**

PROVIDER SYSTEM ROUTE

1. Description of Provider System Route: Provider will provide Customer with \_\_\_\_ fibers from\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_to\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. See Attachment Route Map.

1. Estimated Miles / Footage:
2. Number of Fibers worth of Capacity: \_\_\_ fibers
3. Fiber Type: \_\_\_\_\_\_\_\_\_
4. Dark Fiber Fee ($/Fiber/mile): ($/fiber/mile X # fibers X \_\_\_\_ Miles)
5. Term of Exhibit: Effective Date to the date which is 20 years from the Effective Date.

## Renewal Terms:

1. **Renewal Term of IRU:** 20 years from end of Initial Term
2. **IRU Fee-Renewal Term:**
3. **Maintenance Fee- Renewal Term:**

**EXHIBIT B**

Fiber Optic Cable, Splicing, Testing and Acceptance Standards

1. All splices shall be performed with an industry-accepted fusion-splicing machine.

2. Splices shall be qualified with an Optical Time Domain Reflectometer (OTDR) using bi-directional averaging. The profile alignment system or light injection detection system on the fusion splicer may not be used to qualify splices. Connector (pigtail) splices shall be qualified with a 1km or longer launch reel.

3. After end-to-end (site-to-site) connectivity on the fibers has been established, bi-directional span testing shall be performed. These measurements must be made after the splice manhole or handhole is closed in order to check for macro-bending problems. Connectors shall be cleaned as necessary to ensure accurate measurements are taken.

3.1 Span loss measurements at 1550nm shall be recorded using an industry-accepted calibrated light source and light meter pair. Continuity testing (checking for "frogging") shall be done on all fibers.

3.2 Bi-directional OTDR traces of every IRU fiber shall be provided. These measurements shall represent the current cable and be no more than 2 years old. Industry accepted standard OTDR traces in EXFO or Belcor format shall be used on all traces, unless another OTDR format is agreed to by both parties. Launch reels of 1km in length or longer shall be used for the span OTDR traces of bare fiber. Launch reels of 1km in length or longer shall be used for span OTDR traces of connectorized fiber.

3.3 Spans with average losses exceeding 0.30 dB/km shall be analyzed with an OTDR to develop a fiber rehab plan. Patches and fusion splice events with high loss shall be identified and best effort attempts shall be made to reduce the loss at these points to bring the average end to end loss below 0.30 dB/km.

3.4 All testing shall be conducted at 1550nm only.

3.5 OTDR traces shall be saved in a standard file naming convention.

3.6 One set of CD’s with all traces shall be submitted.

4. The connector and splicing standards:

4.1 The objective loss value of the connector and its associated splice shall be 0.50 dB or less. This value does not include the insertion loss from its connection to the fiber distribution panel.

4.2 The objective splice loss for each fiber within a span shall be an average bi-directional loss of 0.10 dB or less for all splices. For example, if a given span has 10 splices, each fiber shall have a total bi-directional loss (due to the 10 splices) of 1.0 dB or less. Individual bi-directional loss values for each splice shall be reviewed for high losses, which may indicate splice instability.

4.3 The aforementioned standards in sections 4.1 and 4.2 are objectives, not the basis for acceptance. The acceptance standard for each fiber shall be an average bi-directional installed loss of 0.30 dB/km or less across each span.

4.4 Optical return loss shall be no greater than -45dBm for UPC connectors, -50dBm for APC connectors, and -55dBm for splices. Optical return loss per event shall be evaluated from the bi-directional OTDR traces obtained for section 3.2.

5. All connector splices shall be protected with heat shrinks. Backbone splices may be stored in trays with bare fiber manifolds and RTV silicone protection. Buffer tubes/ribbons shall not be split across more than one splice tray. An industry-accepted non-encapsulated splice enclosure shall be used on all splices.

6. The entire fiber optic cable system shall be properly protected from foreign voltage and grounded with an industry-accepted system.

7. Connectors shall be either SC-UPC or LC-UPC with conventional single mode glass.

# **EXHIBIT C**

 System Maintenance Specifications and Procedures

Any party responsible for providing maintenance of the Provider System Route hereunder shall be referred to herein as the "Service Provider". The Party receiving maintenance services from the Service Provider hereunder shall be referred to herein as the "Service Recipient". All other capitalized terms not otherwise defined herein shall have their respective meanings as set forth in the Agreement of which this Exhibit forms a part.

1. MAINTENANCE.

(a) Scheduled Maintenance. Routine maintenance and repair of the Provider System Route described in this Section shall be performed by or under the direction of Service Provider, at Service Provider's reasonable discretion or at Service Recipient's request. Scheduled Maintenance shall commence upon the Acceptance Date of the Agreement. Scheduled Maintenance shall include the following activities:

(i) Patrol of Provider System Route on a regularly scheduled basis, which will be weekly for sectionalized areas and monthly for complete route inspection.

(ii) Maintenance of a "One-Call” program and all required and related cable locates;

(iii) Maintenance of sign posts along the Provider System Route right-of-way with the number of the local "One-Call " organization; and

(iv) Assignment of fiber maintenance employees to locations along the Provider System Route at intervals dependent upon terrain, accessibility, locate ticket volume, etc. Each party shall decide the staffing of fiber maintenance employees for its respective segment(s) of the Provider System Route.

(v) Service Provider shall have qualified representatives on site any time Service Provider has reasonable advance knowledge that another person or entity is engaging in construction activities or otherwise excavating within five (5) feet of the Provider System Route.

(b) Unscheduled Maintenance. Non-routine maintenance and repair of the Provider System Route, which is not included as Scheduled Maintenance, shall be performed by or under the direction of Service Provider. Unscheduled Maintenance shall commence upon the Acceptance Date of the Agreement. Unscheduled Maintenance shall consist of:

(i) "Emergency Unscheduled Maintenance" in response to an alarm identification by Service Provider's Operations Center, notification by Service Recipient or notification by any third party of any failure, interruption or impairment in the operation of the Provider System Route, or any event imminently likely to cause the failure, interruption or impairment in the operation of the Provider System Route.

(ii) "Non-Emergency Unscheduled Maintenance" in response to any potential service-affecting situation to prevent any failure, interruption or impairment in the operation of the Provider System Route.

Service Recipient shall immediately report the need for Unscheduled Maintenance to Service Provider in accordance with procedures promulgated by Service Provider from time to time. Service Provider will log the time of Service Recipient's report, verify the problem and dispatch personnel immediately to take corrective action.

2. OPERATIONS CENTER. Service Provider shall operate and maintain an Operations Center ("OC") capable of receiving Provider System Route alarms twenty-four (24) hours a day, seven (7) days a week. Service Provider's maintenance employees shall be available for dispatch twenty-four (24) hours a day, seven (7) days a week. Service Provider shall have its first maintenance employee at the site requiring Emergency Unscheduled Maintenance activity within two (2) hours after the time Service Provider becomes aware of an event requiring Emergency Unscheduled Maintenance, unless delayed by circumstances beyond the reasonable control of Service Provider. Service Provider shall maintain a toll-free telephone number to contact personnel at the OC. Service Provider's OC personnel shall dispatch maintenance and repair personnel to handle and repair problems detected in the Provider System Route.

3. COOPERATION AND COORDINATION.

(a) Service Recipient shall utilize an Escalation List, as updated from time to time, to report and seek immediate action on exceptions noted in the performance of Service Provider in meeting maintenance service objectives.

(b) Service Recipient will, as necessary, arrange for unescorted access for Service Provider to all sites of the Provider System Route, subject to applicable contractual, underlying real property and other third-party limitations and restrictions.

(c) In performing its services hereunder, Service Provider shall take workmanlike care to prevent impairment to the signal continuity and performance of the Provider System Route. The precautions to be taken by Service Provider shall include notifications to Service Recipient. In addition, Service Provider shall reasonably cooperate with Service Recipient in sharing information and analyzing the disturbances regarding the cable and/or fibers. In the event that any Scheduled or Unscheduled Maintenance hereunder requires a traffic roll or reconfiguration involving cable, fiber, electronic equipment, or regeneration or other facilities of the Service Recipient, then Service Recipient shall, at Service Provider's reasonable request, make such personnel of Service Recipient available as may be necessary in order to accomplish such maintenance, which personnel shall coordinate and cooperate with Service Provider in performing such maintenance as required of Service Provider hereunder.

(d) Service Provider shall notify Service Recipient at least three (3) business days prior to the date in connection with any Maintenance Window (MW) of any Scheduled Maintenance and as soon as possible after becoming aware of the need for Unscheduled Maintenance. Service Recipient shall have the right to be present during the performance of any Scheduled Maintenance or Unscheduled Maintenance so long as this requirement does not interfere with Service Provider's ability to perform its obligations under this Agreement. In the event that Scheduled Maintenance is canceled or delayed for whatever reason as previously notified, Service Provider shall notify Service Recipient at Service Provider's earliest opportunity, and will comply with the provisions of this Section.

4. FACILITIES.

(a) Service Provider shall maintain its respective segment(s) of the Provider System Route in a manner which will permit Service Recipient's use. All common systems within facilities along the Provider System Route shall be maintained in accordance with manufacturer's specifications, to include battery plants, generators, and HVAC units.

(b) Except to the extent otherwise expressly provided in the Agreement, Service Recipient will be solely responsible for providing and paying for any and all maintenance of all electronic, optronic and other equipment, materials and facilities used by Service Recipient in connection with the operation of their fibers, none of which is included in the maintenance services to be provided hereunder.

5. FIBER OPTIC CABLE/FIBERS.

(a) Service Provider shall perform appropriate testing on the fiber optic cable contained in the Provider System Route in accordance with Service Provider's then current preventative maintenance procedures as agreed to by Service Recipient, which shall not substantially deviate from standard industry practice.

(b) Service Provider shall maintain sufficient capability to teleconference with Service Recipient during an Emergency Unscheduled Maintenance in order to provide regular communications during the restoration process. When correcting or repairing fiber optic cable discontinuity or damage, including but not limited to, an event of Emergency Unscheduled Maintenance, Service Provider shall use reasonable efforts to repair traffic-affecting discontinuity within eight (8) hours after the Service Provider maintenance employee's arrival at the problem site. In order to accomplish such objective, it is acknowledged that the repairs so affected may be temporary in nature. In such event, within twenty-four (24) hours after completion of any such Emergency Unscheduled Maintenance, Service Provider shall commence its planning for permanent repair, and thereafter promptly shall notify Service Recipient of such plans, and shall implement such permanent repair within an appropriate time thereafter. Restoration of open fibers on fiber strands not immediately required for service shall be completed on a mutually agreed-upon schedule.

(c) During restoration, the parties agree to work together to restore all traffic as quickly as possible. Service Provider, promptly upon arriving on the site of the cut, shall determine the course of action to be taken to restore the System Route and shall begin restoration efforts. Service Provider shall splice fibers tube by tube or ribbon by ribbon in a logical order with consideration to all lit fibers within the cable.

(d) In performing permanent repairs, Service Provider shall comply with the splicing specifications as set forth in Exhibit B. Service Provider shall provide to Service Recipient any modifications to these specifications as may be necessary or appropriate in any particular instance for Service Recipient's approval, which approval shall not be unreasonably withheld.

(e) Service Provider's shall maintain and supply an inventory of spare fiber optic cable in storage facilities supplied and maintained by Service Provider at strategic locations to facilitate timely restoration.

6. MAINTENANCE WINDOW (MW). Scheduled Maintenance, which is reasonably expected to produce any signal discontinuity, must be coordinated between the parties. Generally, this work should be scheduled after 11:00 p.m. and before 7:00 a.m. local time. Major system work, such as fiber rolls and hot cuts, will be scheduled for MW weekends and shall allow work during daylight hours if on a Saturday or Sunday. Service Provider and Service Recipient will agree upon a MW calendar. The intent is to avoid jeopardy work on high-traffic holidays.

7. SUBCONTRACTING. Service Provider may subcontract any of the maintenance services hereunder; provided that Service Provider shall require the subcontractor(s) to perform in accordance with the requirements and procedures set forth herein. The use of any such subcontractor shall not relieve Service Provider of any of its obligations hereunder.

8. MAINTENANCE FEES AND COSTS.

A) Scheduled Maintenance Fees. Provider shall be responsible for the costs of all scheduled maintenance on its Fiber System.

B) Unscheduled Maintenance Fees. The Costs of Unscheduled Maintenance shall be allocated among the various Interest Holders in the conduit, cable and/or fibers affected thereby as follows: (i) Costs of Unscheduled Maintenance solely to or affecting a conduit or cable which houses fibers of a single Interest Holder shall be borne 100% by such Interest Holder; (ii) Costs of Unscheduled Maintenance to or affecting a conduit which houses multiple innerduct conduits, not including such Costs attributable to the repair or replacement of fiber therein, shall be borne proportionately by the Interest Holders in each of the affected innerduct conduits based on the ratio that such affected conduit bears to the total number of affected innerduct conduits, and (iii) Costs of Unscheduled Maintenance attributable to the repair or replacement of fiber, including the acquisition, installation, inspection, testing and splicing thereof, shall be borne proportionately by the Interest Holders in the affected fiber, based on the ratio that the number of affected fibers subject to the interest of each such Interest Holder bears to the total number of affected fibers. All such Costs, which are allocated to Service Recipient pursuant to the foregoing provisions, shall be the responsibility of and paid by Service Recipient within thirty (30) days after its receipt from Service Provider of an invoice therefor.

9. COSTS. "Costs" means the actual, direct costs paid or payable in accordance with the established accounting procedures generally used by each party, as the case may be, and which it utilizes in billing third parties for reimbursable projects, which costs shall include, without limitation, the following: (i) labor costs, including wages and salaries, benefits and overhead allocable to such labor costs (overhead allocation percentage shall not exceed the lesser of (x) the percentage Service Provider typically allocates to its internal projects or (y) thirty-percent (30%), and (ii) other direct costs and out-of-pocket expenses on a pass-through basis (e.g., equipment, material, supplies, contract services, etc.).

10. TERM. Service Provider's obligation to perform maintenance on the relevant portion of the Provider System Route shall be for the term of this Agreement. If at any time it is determined that the owner thereof is not the Service Provider, the transition to the selected Service Provider shall be done in such a way that would allow compliance with all requirements and obligations to all rights-of-way permitting agencies.