



CO-LOCATION AND INDEMNITY AGREEMENT
NUMBER X-40497

THIS AGREEMENT shall be effective on the last signature date set forth below and is entered into by and between Energy Northwest, a joint operating agency and municipal corporation in the State of Washington, acting by and through its Business Development Fund (hereinafter referred to as "Energy Northwest") and Benton Public Utility District with its principal place of business being located at 2721 West 10th Ave, Kennewick, WA 99336, (hereinafter referred to as "Customer") (collectively hereinafter referred to as the "Parties" and independently as the "Party") and in consideration of the mutual promises and covenants herein, the parties agree as follows:

1.0 Usage of Property

1.1 Energy Northwest shall permit the Customer to utilize certain portions of Energy Northwest property, on a non-exclusive basis, described as follows: Applied Process Engineering Laboratory "APEL Facility", TEC Room, at 350 Hills Street, Richland, WA 99352, (hereafter referred to as "Premises"). Specifically, the Customer has a right to utilize a the TEC room with up to one (1) locking bays of rack space (10 rack units/bay) (hereafter referred to as "Co-Location Space") solely for the purposes set forth in Section 2.0. Energy Northwest shall also provide a Gig E port on their G1000 card provisioned with 6 STS's within their Cisco 15454 backbone to Ashe substation, HVAC controlled space, and power for operations. The permission granted under this Agreement shall not be construed to convey any right, title, or interest in the Premises.

1.2 Customer represents that the rights granted to it under this Agreement shall in no way hinder or impact any Energy Northwest or other Energy Northwest customers' business operation.

1.3 Energy Northwest will provide notifications of planned outages at least one (1) week in advance of scheduled outage.

1.4 Energy Northwest will provide notifications of unplanned/emergent outages no later than four (4) hours after the occurrence.

1.5 All notifications shall be provided to the Noanet Network Operations Center at 1-866-662-6380.

2.0 Permitted Uses

Customer is authorized to utilize said Premises for the purposes of locating, operating and maintaining telecommunications equipment in accordance with

applicable laws, regulations and requirements. Said Premises shall be utilized solely for such purpose(s) and for no other purpose. The Co-Location Space constitutes the assignment by Energy Northwest of a floor assignment, rack assignment, or other specification of a location for the installation of personal property, business and trade fixtures and equipment owned or leased by Customer (collectively, the "Equipment") at the Premises. Energy Northwest may change the initial configuration of Customer's racks at the Premises with 60 days notice to Customer; provided that such change (i) shall not unreasonably disturb or interfere with Customer's business operations, (ii) shall be performed during a planned service period between midnight and 6:00 am, and (iii) shall be at Energy Northwest's sole cost, except for the co-location fee as indicated below.

3.0 Approval by Energy Northwest

Any installations, alterations, improvements, or repairs made by Customer shall be at Customer's own expense and shall be done only at times and in conformity with plans and specifications approved in advance in writing by Energy Northwest, by a licensed contractor approved in advance in writing by Energy Northwest, and in accordance with all laws, rules, regulations, ordinances and requirements of governmental agencies, offices and boards having jurisdiction. Customer will pay directly or reimburse Energy Northwest for any cost incurred by Energy Northwest in obtaining said approval(s). If requested by Energy Northwest, Customer will post a bond or other security reasonably satisfactory to Energy Northwest to protect Energy Northwest against liens arising from work performed for Customer. All work performed shall be done in a good workmanlike manner and with material (when not specifically described in the specifications) of the quality and appearance customary in the trade for first-class construction of the type in which the Co-Location Space is located.

4.0 Restrictions on Use

4.1 Customer, at its sole expense, shall cause the Co-Location Space and all aspects of its business operations and occupancy of the Co-Location Space to be continuously in compliance with all laws, ordinances, and regulations, now or hereinafter enacted concerning the Co-Location Space on the Premises.

4.2 Energy Northwest reserves the right, in its reasonable discretion, to enter the Premises at any time if, in its sole discretion, Energy Northwest deems that such action is necessary to protect the property and rights of Energy Northwest and existing and potential customers of Energy Northwest's services.

5.0 Term of Use

Customer shall have the right, at the discretion of Energy Northwest, to utilize the premises at all hours during the period of one year commencing [Date] and ending [Date], with two one (1) year options to extend exercisable by Customer. Each option shall be deemed exercised unless either party provides thirty (30) days

September 1, 2011
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September 1, 2010
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written notice prior to the expiration of the current term of its election to not exercise the option.

6.0 Compensation, Billing and Payment

Customer agrees to pay to Energy Northwest the following for Co-Location Space and use of the Cisco 15454 backbone to Ashe Substation.

- a. One-time non-reoccurring charge of \$500.00 for installation support.
- b. \$150.00 per month for ten (10) rack units in one (1) locking bay.
- c. \$1,200.00 per month for 6 STS's (approximately 300 Mbits/sec) within the Cisco 15454 backbone to Ashe substation.

Invoices will be submitted monthly, and shall be payable upon presentation. Invoices not paid within 30 days of invoice date may be carried forward to the next invoice date and shall be subject to a carrying charge of one and a half percent (1 ½%) per month. If Customer fails to pay any valid, undisputed invoice within thirty (30) days of the invoice date and such failure continues fifteen (15) days after Energy Northwest gives Customer notice of such failure, Energy Northwest shall have the right to terminate this Agreement immediately. The right to terminate under the terms of this paragraph shall be in addition to all other legal, equitable, or contractual remedies available to Energy Northwest. Remittance will be mailed to Energy Northwest at the address noted on such invoices or as Energy Northwest may otherwise advise.

7.0 Assignment

Customer shall not assign, pledge, transfer, or otherwise convey all or any part of the rights and privileges granted by this Agreement in any manner without prior written consent of Energy Northwest, which consent it will not unreasonably withhold.

8.0 Termination

The permission granted under this agreement may be terminated at any time, by either party with or without cause, by providing the other party a minimum of 60 calendar day's written notice of such termination. In the event Energy Northwest is issuing the termination notice, Customer shall be allowed a reasonable time, not to exceed 30 calendar days, following the termination date, to remove its property from the premises.

EN shall have the right to terminate this agreement at any time should EN determine that the facilities or equipment are no longer excess to its own needs upon giving 60 days notice as stated above.

9.0 Representations and Warranties

Each Party represents and warrants that it has full power and authority to execute, deliver, and perform its obligations under this Agreement. Energy Northwest represents and warrants to Customer that any services provided hereunder will be performed in a manner consistent with that of other reputable providers of the same or similar services in the same locality. EXCEPT AS OTHERWISE SPECIFICALLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY HERETO MAKES ANY WARRANTY, WHETHER EXPRESS, IMPLIED OR STATUTORY, AS TO THE INSTALLATION, DESCRIPTION, QUALITY, MERCHANTABILITY, COMPLETENESS OR FITNESS FOR ANY PURPOSE OF ANY PORTION OF THE NETWORK, EQUIPMENT, OR ANY SERVICE PROVIDED HEREUNDER OR DESCRIBED HEREIN, OR AS TO ANY OTHER MATTER, ALL OF WHICH WARRANTIES ARE HEREBY EXCLUDED AND DISCLAIMED.

10.0 Force Majeure

Neither party is liable for any failure of performance if such failure of performance is due to any cause or causes beyond such Party's reasonable control, including without limitation, acts of God, fire, explosion, vandalism, cable cut, adverse weather conditions, governmental action, labor strikes and supplier failures. Customer's invocation of this clause shall not relieve Customer of its obligation to pay for any services actually received. In the event such failure continues for 60 days, the other Party may terminate the affected portion of the services.

11.0 Condition of the Premises

The Premises are accepted by Customer "as-is." Energy Northwest makes no express or implied warranty or representation as to the condition of the Premises, or to the suitability of said Premises for the usage outlined above. Customer agrees that it has inspected said Premises and found them acceptable for its uses.

12.0 Return of Premises

Customer agrees to return the Premises to the same condition as existed prior to the commencement of the use. Customer shall indemnify Energy Northwest for any damage or injury sustained to the Premises as a result of Customer's usage of said Premises. In the event Customer does not restore the premises to its original condition, EN shall have the right to claim all of Customer's equipment abandoned and to restore or cause to be restored the premises to its original condition and to bill the Customer for the reasonable cost of the restoration.

13.0 Indemnity

13.1 For and in consideration of the permissive use of the Premises described above, Customer agrees to indemnify, waive, and save harmless Energy Northwest and its representatives from and against any and all liability arising from injury or

death of persons or damage to property occasioned by any negligent act or omission or violation or breach of this agreement by Customer, its representatives, agents, invitees, guests or employees, including any and all expense, legal or otherwise, incurred by Energy Northwest or its representatives in the defense of any claim or suit relating to such injury or damage. This indemnification does not apply to liability arising from the negligence of Energy Northwest or its representatives.

13.2 Customer agrees that if their current liability insurance does not sufficiently cover the operations of the "Premises" a supplement to their agreement shall be obtained to indemnify Energy Northwest. Customer's insurance shall name Energy Northwest as an additional insured to Customer's policy.

13.3 Energy Northwest agrees to indemnify, waive, and save harmless Customer and its representatives from and against any and all liability arising from injury or death of persons or damage to property occasioned by any negligent act or omission or violation or breach of this agreement by Energy Northwest, its agents, servants or employees, including any and all expense, legal or otherwise, incurred by Customer or its representatives in the defense of any claim or suit relating to such injury or damage. This indemnification does not apply to liability arising from the negligence of Customer or its representatives.

13.4 Except as noted in this paragraph, Energy Northwest shall not be responsible for or have any liabilities for damages suffered by Customer, its agents, officers, employees, invitees or licensees, customers, subcontractors, suppliers, or any other third party in the event a problem occurs with the operations of the Premises and/or any problem which results in failure in operations of these facilities. Such damages shall include, but not be limited to: violation of any third party intellectual property rights; loss or restoration of data or financial loss as a result of failure of operations, and all claims of any kind by Customer's end users. In the event of Energy Northwest's unlawful or willful misconduct in operating the Premises or facilities, Energy Northwest's liability shall be limited to damages caused to Customer's physical assets located on the Premises. Provided in no event shall Energy Northwest be liable to Customer, its agents, officers, employees, invitees or licensees, customers, subcontractors, suppliers or any other third party for damages for loss of use.

13.5 For the purpose of fulfilling this indemnity obligation, each Party agrees that this indemnity agreement shall apply to, but not be limited to, actions brought by its own employees against the other Party; i.e., for the purposes of suits brought against a Party ("sued Party") by the other Party's own injured employee ("employing Party"), the employing Party waives its immunity rights or protections created by the Worker's Compensation Act solely for the purpose of indemnifying the sued Party for the employing Party's own injured employee. The Parties agree that for actions brought by a Party's employee where the employee is solely suing its employer, the employing Party has not waived its Worker's Compensation Act and/or Industrial Insurance Act immunity rights or protections. THE PARTIES HEREBY

ACKNOWLEDGE THIS PROVISION WAS MUTUALLY AGREED TO BY BOTH PARTIES.

13.6 As used in this provision, the phrase "any and all expense" includes, but is not limited to, claims, suits, judgments or proceedings for services, taxes, labor performed, materials furnished, provisions, supplies, board and room, liens, medical expenses, pain and suffering, bodily injury, death, loss of earnings, loss of consortium, garnishments, court costs and attorney fees (including those required to seek enforcement of this agreement), and other costs of defense.

14.0 Insurance

14.1 The Customer shall, at Customer's expense, maintain its membership in PURMS Joint Self-Insurance Agreement ("PURMS Agreement"), or a commercial general liability insurance policy with an insurer acceptable to Energy Northwest, insuring against any and all claims for injury to or death of persons and loss of or damage to property occurring upon, in or about the Premises arising from an act or omission of the Customer or any of its agents, employees, and representatives. Such agreement or insurance shall have liability limits of \$2 million combined single limit for bodily injury and property damage per occurrence and in the aggregate.

14.2 Customer or Customer's PURMS or insurer shall have the option to perform any required environmental remediation, or to pay for or reimburse the costs of any required environmental remediation to the satisfaction of Energy Northwest, Energy Northwest's insurer and the responsible regulatory authorities.

14.3 All insurance or PURMS Agreement required above shall be primary insurance to Energy Northwest for any and all of Customer's covered liabilities arising from an act or omission of the Customer or any of its agents, contractors, representatives, licensees or invitees. Any such insurance maintained by Energy Northwest shall be excess of Customer's insurance and shall not contribute to it. The liability of Customer and any of its insured's shall not be reduced, offset, or otherwise affected by the existence and/or collectability of any insurance maintained by Energy Northwest and;

14.3.1 Shall contain a provision whereby the carrier agrees not to cancel or significantly modify the insurance without 30 days prior written notice to Energy Northwest; and

14.3.2 Shall name Energy Northwest as additional insured;

14.3.3 Shall not contain a severability of interest's exclusion; and,

14.3.4 Shall contain a waiver of subrogation clause.

14.4 Customer agrees that if their current liability insurance or the PURMS Agreement does not sufficiently cover the operations of the Premises, a supplement to their agreement or insurance shall be obtained to indemnify Energy Northwest. Customer's insurance or the PURMS Agreement shall name Energy Northwest as an additional insured to Customer's policy, or agreement.

14.5 The Parties understand that the comparative fault laws of the State of Washington will bind them.

14.6 On or before Customer taking possession of the Premises pursuant to this Co-Location Agreement, each party shall provide to the other a copy of the insurance policies, agreement, or certificates evidencing the aforesaid insurance coverage required above. Any commercial insurance shall be with underwriters acceptable to Energy Northwest, such acceptance by Energy Northwest not to be unreasonably withheld. Renewal certificates and any changes in terms or underwriter shall be furnished to Energy Northwest for approval at least 30 days prior to the expiration date of each policy for which a certificate was theretofore furnished.

14.7 Customer Property Insurance: The Parties understand that Customer assumes all responsibility for loss to its personal property and leasehold improvements and alterations on the Premises, and Customer's loss of income due to fire on the Premises. Energy Northwest is in no way responsible for insuring, replacing, or repairing Customer's personal property, leasehold improvements and alterations, or loss of income, except for loss to Customer's personal property as a direct result of Energy Northwest's negligent acts, errors or omissions.

14.8 Energy Northwest Property Insurance: Energy Northwest shall, at Energy Northwest's expense, maintain for APEL a commercial property policy including a Causes of Loss - Special Form, in an amount of the replacement value of the facility and permanently installed fixtures and equipment. All proceeds of any such insurance shall be payable to Energy Northwest and shall be applied to the restoration of the Premises. Any proceeds of such insurance remaining after such restoration shall belong to Energy Northwest.

15.0 Environmental, Health and Safety

15.1 The Customer shall be solely responsible for all Customer activities conducted within APEL to ensure that such activities are, on an on-going basis, in compliance with the environmental/regulatory requirements of the Environmental Protection Agency or the Washington State Department of Ecology, the health and safety requirements of OSHA, WSHA, the City of Richland and Benton County, and with any environmental or personnel health and safety requirements that may be established and communicated in writing by APEL management.

15.2 Customer agrees to collect and dispose of any and all hazardous waste generated by its activities at APEL in compliance with local, state, and federal laws and regulations.

16.0 Assumption of Risk

16.1 To the extent permitted by law, the Customer assumes all risk of injury to persons or damage to property occurring in or about the Premises as a result of Customer's use or occupancy of the Premises (unless caused by the negligent act, error or omission of Energy Northwest, its employees or agents), the negligence or willful misconduct of Customer, its agents, officers, representatives, employees, invitees or guests, or as a result of Customer's failure to perform or abide by any of the covenants or conditions of this Agreement. The Customer shall reimburse Energy Northwest for any costs or expenses, including attorney's fees, which Energy Northwest may incur in defending any such claim.

16.2 Energy Northwest shall not be responsible for any injuries or damages incurred by Customer, its agents, officers, employees, invitees or licensees arising from acts or omissions of any co-tenants or from any cause other than the negligence or willful misconduct of Energy Northwest or its employees.

17.0 Security

17.1 Energy Northwest and their respective employees, agents, invitees and licensees agree to comply with all security regulations and procedures established by the Energy Northwest for the facility. Energy Northwest shall provide up to two (2) Customer employees, and such other individuals designated by Customer, and agreed to by Energy Northwest, with electronic security access and photo identification cards for access to the facility, including common use areas. Customer shall pay Energy Northwest thirty dollars (\$30) for each electronic access key card with picture or twenty five dollars (\$25) for a keycard without a picture and ten dollars (\$10) for a photo ID card only, or for replacements thereof due to damage or loss.

17.2 Customer shall provide and maintain at its sole expense its own security provisions specific to portions of the Customer Premises for which Customer security requirements exceed facility security provisions provided by Energy Northwest. Customer shall provide Energy Northwest reasonable access to such Customer secured areas in case of emergency, and to provide Energy Northwest with reasonable assurance that Customer remains in compliance with the terms and conditions of this Agreement, and to conduct routine facility maintenance and inspections in accordance with the terms and conditions of this Agreement.

18.0 Site Rules

Customer represents that its employees, representatives, invitees and agents will abide by all Energy Northwest rules and regulations while on Energy Northwest Premises.

19.0 Interpretation

The agreement shall be construed and interpreted in accordance with the laws of the State of Washington.

20.0 Entire Agreement

This agreement and any addenda, attachments, exhibits, and other documents incorporated herein constitute the entire agreement between the Parties with respect to its subject matter and supersede all other representations, understandings or agreements that are not expressed herein, whether oral or written. Except as otherwise set forth, no amendment to this Agreement shall be valid unless in writing and signed by both Parties.

21.0 Notices

For purposes of this Agreement, notices as required hereunder or otherwise desired by the Customer shall be forwarded to Energy Northwest's representative:

Jacque Fuller, Telecommunications Supervisor
Energy Northwest
PO Box 968 MD 1032
Richland, WA 99352
509.377.8757

Notices as required hereunder or otherwise desired by Energy Northwest shall be forwarded to Customer's representative:

Richard Nall, Manager of Broadband
Benton PUD
PO Box 6270
Kennewick, WA 99336
509.582.1237

22.0 Execution

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement, in duplicate, as of the date first written above

ENERGY NORTHWEST Signature: <u>Richard A. Shaff</u> Name: Richard A. Shaff Title: Supervisor, Purchasing/Contracts Date: <u>7/2/10</u>	BENTON PUBLIC UTILITY DISTRICT Signature: <u>Chad B. Bartram</u> Name: <u>CHAD B. BARTRAM</u> Title: <u>ASST GEN MGR</u> Date: <u>6/19/10</u>
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