



Linu Parappilly
CIO / Director

Technology Services

1021 Courthouse Road Oregon City, OR 97045

January 26, 2023

BCC Agenda Date/Item: _____

Board of County Commissioners
Clackamas County

Approval of an Intergovernmental Agreement with the City of Sandy for construction, operation, and maintenance of internet services on the Clackamas Broadband eXchange fiber network. Total value is \$2,155,680 over 10 years. Funding through County ARPA funds allocated to the Clackamas Broadband eXchange. No County General Funds are involved.

Previous Board Action/Review	The Board approved a similar IGA with the City of Sandy on August 8, 2019.		
Performance Clackamas	<ol style="list-style-type: none"> 1. Build a strong infrastructure. 2. Grow a vibrant economy. 		
Counsel Review	AN, December 7, 2022	Procurement Review	N/A
Contact Person	Duke Dexter	Contact Phone	503-722-6663

EXECUTIVE SUMMARY: On August 8, 2019, the Clackamas County Board signed an Intergovernmental Agreement with the City of Sandy as a partner with CBX to provide Internet services on the CBX network. This was a pilot project with a defined area as a proof of concept project to ensure that the Internet service could be delivered and still provide an exceptional service. This pilot project has proved to be highly successful and now the City of Sandy and CBX are looking to expand this service throughout Clackamas County. With the resources CBX has received from the Clackamas County ARPA funding for broadband expansion, it is estimated that a total of 1,600 new residential sites will be accessing the Internet from the CBX network. This IGA will be the first of many from other ISP's to provide services to the residents of Clackamas County. If this IAG is approved, then CBX is estimated to generate \$2,155,680.00 over the next ten years.

RECOMMENDATION: Staff respectfully recommends that the Board approve this Intergovernmental Agreement with the City of Sandy for ISP services on the CBX network.

Respectfully submitted,

Linu Parappilly,
CIO / Director

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**INTERGOVERNMENTAL AGREEMENT
BETWEEN CLACKAMAS COUNTY
AND THE CITY OF SANDY**

THIS AGREEMENT (“Agreement”) is entered into and by and between Clackamas County (“County”), a political subdivision of the State of Oregon, and the City of Sandy (“City”), a political subdivision of the State of Oregon, pursuant to ORS Chapter 190 (Cooperation of Governmental Units), collectively referred to as the “Parties” and each a “Party.”

RECITALS

WHEREAS, authority is conferred under ORS Chapter 190 to local governments to enter into agreements for the performance of any and all functions and activities that a party to the agreement, its officers or agencies have authority to perform; and

WHEREAS, the parties desire to partner for a fiber-to-the-x project whereby the City will serve as the Internet Service Provider (“ISP”) and the County will construct the necessary infrastructure and provide the dark fiber connections to the City’s customers (the “Project”); and

NOW, THEREFORE, 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. **Term.** This Agreement shall be effective upon execution by both Parties and shall continue for a term of five (5) year from the date of execution. This Agreement shall automatically renew for an additional one (1) year term each year thereafter unless otherwise terminated by the parties provided, however, that the term may not exceed a maximum of 10 years from the date of execution.
2. **Rights and Obligations of the County.**
 - A. Upon written request from the City, County shall construct the necessary infrastructure and install a dark fiber connection to the property owners who have agreed to have the City serve as an ISP as part of the Project (“Infrastructure Construction”). Infrastructure Construction shall be performed by County in its sole discretion. The County is and will remain the owner of any infrastructure and dark fiber installed as part of the Infrastructure Construction. Prior to County performing the Infrastructure Construction, the County will consult with the City to ensure that the specifications of the infrastructure and fiber are compatible with City’s system. Prior to the County performing the Infrastructure Construction, the City shall ensure the following construction and installation requirements are satisfied at each property:
 - a. The City has secured all easements, leases, licenses, authorizations, or other agreements from property owner to allow County to use existing pathways to, into and within each site to the demarcation point for service, and to otherwise perform the Infrastructure Construction.
 - b. A path acceptable to the County is provided for the fiber optic cable from the point of entry into the site to the termination panel or CSP (Customer Splice Point) and into the home demarcation that complies with all applicable building, electrical, fire and related codes.
 - c. The County and its employees, agents, lessees, officers and its authorized vendors, upon reasonable notice, have reasonable ingress and egress into and out of the properties and

buildings in connection with the provision of service.

- B. Following construction of such infrastructure, and throughout the term of this Agreement, County shall maintain and repair, as necessary and as determined by County in its sole discretion, all County-owned infrastructure necessary to provide service to each customer receiving service pursuant to this Agreement. County shall have the sole discretion to determine how to maintain said infrastructure and make the required repairs.
- C. Subject to the availability of funds, as determined by the County in its sole administrative discretion, the County will provide all funds for the expansion of the fiber network to serve the property owners involved in the Project including, but not limited to, the expansion of the backbone fiber, and all drops or laterals. The County will also contribute up to \$15,000.00 for purchase of new ISP equipment necessary to provide service to the property owners. This ISP equipment shall be procured and managed solely by the City. In procuring the ISP equipment, the City shall comply with all local, state, or federal law, including the Oregon Public Contracting Code, applicable to the procurement of goods and services. Upon termination of this agreement, title and ownership to all ISP equipment purchased by the City with County funds will be conveyed to County and will be removed from the City's network at the City's expense.

3. **Rights and Obligations of City.**

- A. If County performs the Infrastructure Construction necessary to serve a property owner as requested by the City, the City will provide ISP services to the property owner pursuant to those terms and conditions as may be mutually agreed to between the City and the property owner. County will have no involvement or interest in, and will not be a party to, any such agreement entered into by and between City and the property owner.
- B. In serving as an ISP, City shall provide all commercially reasonable ISP services including, but not limited to, IP addresses, billings, and general customer service. Customer service will be available Monday through Friday from 9 am to 5 pm, excluding federal holidays. City will not impose any data caps on the amount of data used by the customer. City will not be able to slow or restrict use in any way based on the amount of data used by each customer, unless in the event of an emergency or abuse as defined by SandyNet's internet access policy.¹
- C. As of the date of this Agreement, City will provide the ISP services to property owners at a cost of \$64.95 per month per customer for a symmetrical 500 Mg service or \$84.95 per month per customer for a symmetrical 1 Gig service. Of this fee, \$40.00 will be withheld by the City for each 500 Mbps customer and \$60.00 for each Gig customer. The remainder of the funds received from each customer for the ISP services will be sent to County. Cost does not include any fees or taxes that may be imposed on City or County, which may be added to the customer's cost.
- D. City must participate in either the United State Federal Communications Commission's Affordable Connectivity Program (ACP), or provide access to a broad-based affordability program to low-income consumers that provides benefits commensurate to ACP. Provider's low-cost service must include at least one low-cost option offered without data usage caps for a household with multiple users to simultaneously telework and engage in remote learning. City must further abide with applicable rules, regulations, and guidance regarding the use Coronavirus State and Local Fiscal Recovery Funds (SLFRF) including, but not

¹ City of Sandy, *Internet Access Policies* 18/16/2016, <https://www.ci.sandy.or.us/sandynet/page/internet-access-policies>.

limited to, United States Department of Treasury Final Rule for SLFRF General Broadband investment sections 31 CFR 35.6(e)(2)(i).²

- E. If reporting of any type or any frequency is required for City or County funding, grants, or organization specific processes, each party agrees to reasonably cooperate to assist the other party in meetings its reporting needs, and the parties shall endeavor to define and agree in writing to reporting parameters and frequency of occurrence.
- F. Rate increases shall occur no more than once per calendar year and only as be mutually agreed upon by both parties and via a written amendment to this agreement. Rate increases that are due to a government-imposed fee or tax are exempt from the requirements of this section.

4. **Representations and Warranties.**

- A. *City representations and warranties:* City represents and warrants to County that City has the power and authority to enter into and perform this Agreement, and this Agreement, when executed and delivered, shall be a valid and binding obligation of City enforceable in accordance with its terms.
- B. *County Representations and Warranties:* County represents and warrants to City has the power and authority to enter into and perform this Agreement, and this Agreement, when executed and delivered, shall be a valid and binding obligation of County enforceable in accordance with its terms.
- C. The warranties set forth in this section are in addition to, and not in lieu of, any other warranties provided.

5. **Termination.**

- A. The County and City, by mutual written agreement, may terminate this Agreement at any time. Either Party may terminate for convenience upon providing one hundred twenty (120) days' written notice to the other Party.
- B. Either the County or City may terminate this Agreement in the event of a breach of the Agreement by the other. Prior to such termination however, the Party seeking the termination shall give the other Party written notice of the breach and of the Party's intent to terminate. If the breaching Party has not entirely cured the breach within fifteen (15) days of deemed or actual receipt of the notice, or other time as may be agreed between the parties in writing, then the Party giving notice may terminate the Agreement at any time thereafter by giving written notice of termination stating the effective date of the termination. If the default is of such a nature that it cannot be completely remedied within such fifteen (15) day period, this provision shall be complied with if the breaching Party begins correction of the default within the fifteen (15) day period and thereafter proceeds with reasonable diligence and in good faith to effect the remedy as soon as practicable. The Party giving notice shall not be required to give more than one (1) notice for a similar default in any twelve (12) month period.
- C. The County or City shall not be deemed to have waived any breach of this Agreement by the other Party except by an express waiver in writing. An express written waiver as to one

² United States Department of Treasury, 31 CFR 35.6(e)(2)(i), <https://www.ecfr.gov/current/title-31/subtitle-A/part-35/subpart-A/section-35.6>, accessed on 11/27/2022

breach shall not be deemed a waiver of any other breach not expressly identified, even though the other breach is of the same nature as that waived.

- D. Either Party may terminate this Agreement in the event the Party fails to receive expenditure authority sufficient to allow that Party, in the exercise of its reasonable administrative discretion, to continue to perform under this Agreement, or if federal or state laws, regulations or guidelines are modified or interpreted in such a way that performance under this Agreement is prohibited or a Party is prohibited from paying for such work from the planned funding source.
- E. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.

6. Indemnification.

- A. Subject to the limits of the Oregon Constitution and the Oregon Tort Claims Act or successor statute, the County agrees to indemnify, save harmless and defend City, its officers, elected officials, agents and employees from and against all costs, losses, damages, claims or actions and all expenses incidental to the investigation and defense thereof arising out of or based upon damages or injuries to persons or property caused by the negligent or willful acts of the County or its officers, elected officials, owners, employees, agents, or its subcontractors or anyone over which the County has a right to control.
- B. Subject to the limits of the Oregon Constitution and the Oregon Tort Claims Act or successor statute, City agrees to indemnify, save harmless and defend the County, its officers, elected officials, agents and employees from and against all costs, losses, damages, claims or actions and all expenses incidental to the investigation and defense thereof arising out of or based upon damages or injuries to persons or property caused by the negligent or willful acts of City or its officers, elected officials, owners, employees, agents, or its subcontractors or anyone over which City has a right to control.

7. **Insurance.** The Parties agree to maintain insurance levels sufficient to cover the obligations agreed to in this Agreement.

8. Party Contacts

- A. Duke Dexter or his designee will act as liaison for the County.

Contact Information:

Duke Dexter
121 Library Court
Oregon City, Oregon 97045
ddexter@clackamas.us
Fax: 503-655-8255

Greg Brewster or his designee will act as liaison for City.

Contact Information:

Greg Brewster
39250 SE Pioneer Blvd
Sandy, Oregon 97055
gbrewster@ci.sandy.or.us

- B. Either Party may change the Party contact information, or the invoice or payment addresses by giving prior written notice thereof to the other Party at its then current notice address.
- C. Any notice required to be provided under this Agreement shall be provided to the Party Contact at the address specified herein. Notices shall be made by personal service, in which case they are effective on the date of service, or by certified mail, in which case they are effective on the date of delivery, or if delivery is refused, upon the date of delivery refusal.

9. General Provisions

- A. **Oregon Law and Forum.** This Agreement, and all rights, obligations, and disputes arising out of it will be governed by and construed in accordance with the laws of the State of Oregon without giving effect to the conflict of law provisions thereof. Any claim between County and City that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the Circuit Court of Clackamas County for the State of Oregon; provided, however, if a claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this section be construed as a waiver by either Party of any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any claim or from the jurisdiction of any court. City, by execution of this Agreement, hereby consents to the in personam jurisdiction of the courts referenced in this section.
- B. **Compliance with Applicable Law.** Both Parties shall comply with all applicable local, state and federal ordinances, statutes, laws and regulations. All provisions of law required to be part of this Agreement, whether listed or otherwise, are hereby integrated and adopted herein. Failure to comply with such obligations is a material breach of this Agreement.
- C. **Non-Exclusive Rights and Remedies.** Except as otherwise expressly provided herein, the rights and remedies expressly afforded under the provisions of this Agreement shall not be deemed exclusive, and shall be in addition to and cumulative with any and all rights and remedies otherwise available at law or in equity. The exercise by either Party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other remedies for the same default or breach, or for any other default or breach, by the other Party.
- D. **Access to Records.** The Parties shall retain, maintain, and keep accessible all records relevant to this Agreement (“Records”) for a minimum of six (6) years, following Agreement termination or full performance or any longer period as may be required by applicable law, or until the conclusion of an audit, controversy or litigation arising out of or related to this Agreement, whichever is later. The Parties shall maintain all financial records in accordance with generally accepted accounting principles. All other Records shall be maintained to the extent necessary to clearly reflect actions taken. During this record retention period each Party shall permit the other Parties’ authorized representatives’ access to the Records at reasonable times and places for purposes of examining and copying.
- E. **Debt Limitation.** This Agreement is expressly subject to the debt limitation of Oregon counties set forth in Article XI, Section 10, of the Oregon Constitution, and any debt

limitations contained in any City or County charter, and is contingent upon funds being appropriated therefore. Any provisions herein which would conflict with law are deemed inoperative to that extent.

- F. **Severability.** If any provision of this Agreement is found to be unconstitutional, illegal or unenforceable, this Agreement nevertheless shall remain in full force and effect and the offending provision shall be stricken. The Court or other authorized body finding such provision unconstitutional, illegal or unenforceable shall construe this Agreement without such provision to give effect to the maximum extent possible the intentions of the Parties.
- G. **Integration, Amendment and Waiver.** Except as otherwise set forth herein, this Agreement constitutes the entire agreement between the Parties regarding its subject matter. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of either Party to enforce any provision of this Agreement shall not constitute a waiver by such Party of that or any other provision.
- H. **Interpretation.** The titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.
- I. **Independent Contractor.** Each of the Parties hereto shall be deemed an independent contractor for purposes of this Agreement. No representative, agent, employee or contractor of one Party shall be deemed to be a representative, agent, employee or contractor of the other Party for any purpose, except to the extent specifically provided herein. Nothing herein is intended, nor shall it be construed, to create between the Parties any relationship of principal and agent, partnership, joint venture or any similar relationship, and each Party hereby specifically disclaims any such relationship.
- J. **No Third-Party Beneficiary.** City and County are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.
- K. **Assignment.** Neither Party shall assign or transfer any of its interest in this Agreement, by operation of law or otherwise, without obtaining prior written approval from the other Party, which shall be granted or denied in that Party's sole and absolute discretion. One Party's consent to any assignment shall not relieve the other Party of any of its duties or obligations under this Agreement.
- L. **Counterparts.** This Contract may be executed in several counterparts (electronic or otherwise), each of which shall be an original, all of which shall constitute the same instrument.
- M. **Survival.** The provisions of Sections 5, 7, and 10 shall survive the termination of this Agreement.

- N. **Necessary Acts.** Each Party shall execute and deliver to the others all such further instruments and documents as may be reasonably necessary to carry out this Agreement.
- O. **Successors in Interest.** The provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective authorized successors and assigns.
- P. **Force Majeure.** Neither City nor County shall be held responsible for delay or default caused by events outside of City's or County's reasonable control including, but not limited to, fire, terrorism, riot, acts of God, or war.
- Q. **Confidentiality.** The Parties and their employees or agents may, in the course of this Agreement, be exposed to or acquire material identified as confidential information. Such information shall be deemed confidential information of the Party identifying it as such ("Confidential Information"). The Parties agree to hold Confidential Information in strict confidence, using at least the same degree of care that each Party uses in maintaining the confidentiality of its own confidential information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties or use Confidential Information for any purpose unless specifically authorized in writing under this Agreement or required by law.


[Signatures on Following Page]

IN WITNESS HEREOF, the Parties have executed this Agreement by the date set forth opposite their names below.

Clackamas County

City of Sandy

Chair, Board of County Commissioners



By: Stan Pulliam
Its: Mayor

Date

January 6, 2023
Date

Recording Secretary