

EBS LONG TERM *DE FACTO* TRANSFER LEASE AGREEMENT

This **EBS LONG TERM *DE FACTO* TRANSFER LEASE AGREEMENT** ("Agreement") is entered into this 21st day of December, 2009 (the "Effective Date"), by and between the Board of Cooperative Educational Services, a Wyoming Board of Cooperative Higher Educational Services ("BOCHES"), and the City of Gillette, Wyoming, a municipal corporation and City of the First Class (the "City").

RECITALS

WHEREAS, BOCHES is a Wyoming Board of Cooperative Educational Services, created pursuant to Wyoming Statutes 21-20-101, et seq., by the Northern Wyoming Community College District, the Campbell County School District ("CCSD"), and the Johnson County School District to work together and cooperate to provide educational services;

WHEREAS, in furtherance of such objectives, BOCHES holds a license ("License") issued by the Federal Communications Commission ("FCC") to operate Educational Broadband Service ("EBS") station WNC619 (the "Station") on channels D1, D2, D3 and D4 (each such channel being a "Channel" and, collectively, the "Channels") in the Geographic Service Area associated with the License (as such may be expanded or modified hereafter, the "Market"), as depicted on Exhibit A hereto;

WHEREAS, the City owns and operates a fiber optic network using certain public and private rights-of-way ("Fiber Network"), and seeks to use EBS spectrum, as defined by Part 27 of the FCC Rules, to expand the Fiber Network to include wireless access for City services such as police, utility and building inspection ("Wireless Services," which may include digital, two-way, fixed, temporary-fixed, mobile or portable Internet access, data, video, voice, or telephony services that are deployed using cellular architectures, web architectures, or any other uses, technologies or architectures the City may choose and the FCC Rules may now or hereafter permit for EBS spectrum) in the Market.

WHEREAS, BOCHES desires to permit the City to use all of the capacity on Channel D4 ("Leased Channel") pursuant to the terms and conditions of this Agreement, and the City desires to use such capacity, together with any other spectrum the City may lease or license in the Market, to provide Wireless Services (all such spectrum and all facilities utilized in the Market in connection with the provision of Wireless Services, including but not limited to the facilities specified in Section 4 hereof, being the "Wireless System").

In consideration of the mutual promises set forth below, the parties agree as follows:

TERMS AND CONDITIONS

1. Term.

(a) **Term.** Subject to Paragraph 1(b), the term shall begin on the date upon which the FCC has approved the FCC Long Term Lease Application (as hereinafter defined) filed by the parties with respect to this Agreement pursuant to Section 7(a) hereof (the "Effective Date"), and shall continue until December 31, 2015 (the "Term"), unless this Agreement is terminated earlier in accordance with Section 10. The Term shall automatically renew for two (2) successive terms of ten (10) years each (each, a "Renewal Term") unless the parties mutually agree at least seventy-five (75) days prior to the end of the Term or the then-existing Renewal Term that they desire to not renew or extend this Agreement

beyond such Term or Renewal Term. The Term and Renewal Term shall be collectively referred to herein as the "Term."

(b) **Renewal of License and Extension of Agreement.** At any such time that the License expires during the Term, this Agreement will also expire unless the License is renewed and FCC authorization for this Agreement is extended. BOCHES will timely file a renewal application for the License, as well as a request for an extension of the Agreement Term. This Agreement will continue to apply unless the FCC denies by Final Order any application for Renewal of the License or extension of the Term. "Final Order" means an order issued by the FCC that is in full force and effect and as to which (i) no timely-filed petition for reconsideration, application for review or appeal is pending and (ii) the time for the filing of any such petition, application or appeal has passed.

(c) **Exclusivity.** BOCHES agrees that during the Term it shall not negotiate or discuss with any third party the use, lease, sale, transfer or assignment of the Leased Channel, or any part thereof, or any option therefor, subject to BOCHES' right to assign the Channels to a qualified EBS eligible entity under the circumstances described in Section 16(c).

(d) **Right of First Refusal.** During the Term and for a period of twelve (12) months following expiration of the Term, or for a period of twelve (12) months following early termination of the Agreement pursuant to Section 10 due to default by BOCHES (the "ROFR Period"), the City shall have a right of first refusal with respect to any offers received by BOCHES to sell the License to a commercial entity (if the FCC's Rules regarding eligibility allow the License to be held by such an entity), or lease or otherwise permit use any of the capacity on Leased Channel (or any part thereof) in any other manner other than for permitted EBS purposes, or to sell to a commercial entity an option to acquire, lease or otherwise use any of the capacity on Leased Channel (or any part thereof) as follows: Upon the receipt by BOCHES of any bona fide offer (an "Offer") which BOCHES has determined to accept and BOCHES is legally and contractually able to accept, BOCHES shall transmit a notice of the Offer to the City (the "Offer Notice"). The Offer Notice shall: (i) contain the name and address of the offering party and all terms of such Offer; and, (ii) offer to the City the option of entering into an agreement with BOCHES upon the same terms and conditions as those set forth in the Offer Notice. The City shall have thirty (30) days following receipt of the Offer Notice to accept the terms thereof in writing. If the City timely accepts, the City and BOCHES shall enter into an agreement with the terms and conditions set forth in the Offer Notice. If the City does not timely accept the terms of the Offer Notice, its rights thereto shall terminate and BOCHES may enter into an agreement with the original offering party on the same terms and conditions as were offered to the City.

2. Legacy Services; Transition.

(a) **Legacy Services.** The parties acknowledge and agree that, as of the date of this Agreement, the Station is not being used to transmit signals, and there are no legacy services or facilities.

(b) **Transition.** The FCC requires most EBS licensees to transition their spectrum to a new spectrum plan pursuant to Sections 27.1230 through 27.1235 of the FCC's Rules within the time period specified by the FCC Rules (the "Transition"). Other than the modification of the License to reflect operation on the frequencies specified in Section 27.5(i)(2) of the FCC Rules, BOCHES and the City acknowledge that the Transition involving the Channels has been completed and that BOCHES has reached agreement with the entity initiating and/or overseeing the Transition of the Channels that satisfies BOCHES' rights and interests in the migration of video services.

3. Wireless Facilities.

(a) **Excess Capacity; BOCHES' Capacity.** "Excess Capacity" is all of the capacity on the Leased Channel. "BOCHES' Capacity" is the capacity on the Channels reserved for BOCHES' use under this Agreement, including, following the Transition, all of the capacity on Channels D1, D2 and D3 in the Lower Band Segment and all guard-band and any other spectrum, capacity, rights or transmission medium associated with the Channels. BOCHES' Capacity shall be at least five percent (5%) of the capacity of the Channels. The City shall be entitled to use Excess Capacity for any lawful purpose. BOCHES may use BOCHES' Capacity for any other lawful educational purpose.

(b) **Operation, Maintenance and Repair of Wireless System Facilities.** The City may at its expense construct, operate and maintain facilities for Wireless Services on the Channels in the Market ("Wireless System Facilities"). The City shall at its own expense manage, operate, maintain and repair the Wireless System Facilities, and provide Wireless Services, in accordance with all applicable requirements of the FCC, all other applicable legal requirements, and good engineering standards and practices.

(c) **"Substantial Service."** BOCHES acknowledges that it shall remain solely responsible for meeting the "substantial service" obligations described in FCC Rules in a timely manner. Notwithstanding the foregoing, to the extent the City constructs Wireless System Facilities in the Market, BOCHES may attribute to itself the build-out or performance activities of the City for purposes of complying with any substantial service, build-out or performance requirements applicable to the License.

(d) **Educational Content and Use.** BOCHES shall be solely responsible for providing or arranging for any educational content or other educational use that is required to be transmitted over the Channels.

(e) **Spectrum Changes.** BOCHES will not take any voluntary action to convert, swap, exchange, relinquish or in any way transfer, its License or the Channels for the same, similar or different spectrum, licenses, channels and/or other consideration, in the same or different market areas.

4. Fiber Network.

(a) **Provision of Facilities.** In consideration for the use of the Leased Channel, the City shall install fiber optic cables to connect the CCSD facilities to the Fiber Network in accordance with the construction plan described in Exhibit B hereto (the "CCSD Fiber Project"). The City's construction of the CCSD Fiber Project shall occur within five (5) years of the Effective Date to correspond to the initial Term of this Agreement; *provided that*, the parties shall meet prior to June 30, 2013 (the "Mid-Term Meeting") to discuss the fourth and fifth year construction; *provided further*, that if the parties cannot agree on fourth and fifth year construction, then the parties shall proceed as described on Exhibit B. A specific pair of fiber optic cables from within the Fiber Network shall be dedicated to the exclusive use of CCSD. All fiber optic cables to connect CCSD facilities shall be owned and maintained by the City as a part of the Fiber Network. The City shall manage all construction aspects of the CCSD Fiber Project, and CCSD shall manage all cabling and end user equipment within its buildings. The City shall maintain the fibers during the Term. BOCHES and the City agree that CCSD will only have access to the City fiber optic cables that are provided to it at the demarcation points and not elsewhere on the Fiber Network without further agreement with the City. This Agreement shall not be construed to allow BOCHES or CCSD to locate any of its equipment at any City facilities without further written agreement between the parties.

(b) **Repair of the Fiber Network.** BOCHES shall be responsible for any damage to the Fiber Network caused by its negligence or the negligence of its employees agents or contractors and shall pay CITY for the actual cost of those repairs. BOCHES may not sublease the fiber optic cables that are part of the Fiber Network and shall use them exclusively for the CCSD Fiber Project.

5. Spectrum Leasing Requirements.

(a) **Control.** Notwithstanding anything in this Agreement to the contrary, and subject to prior FCC consent to the FCC Long Term Lease Application with respect to this Agreement, the parties expressly acknowledge that this Agreement is designed to transfer *de facto*, but not *de jure*, control of the leased spectrum to the City in accordance with Section 1.9030 of the FCC Rules. This Agreement: (i) does not and will not vest in the City, or constitute, create or have the effect of constituting or creating, *de jure* control, direct or indirect, over BOCHES or the License, which ownership or control remains exclusively and at all times in the BOCHES; and, (ii) does not and will not constitute the transfer, assignment, or disposition in any manner, voluntary or involuntary, directly or indirectly, of the License or the transfer of control of the BOCHES within the meaning of Section 310(d) of the Communications Act (as hereinafter defined) other than for spectrum leasing purposes. During the Term, the City will not take any action inconsistent with or contrary to the BOCHES' *de jure* control, as that term is construed by the FCC, over the License. During the Term, the City will not hold itself out to the public as the holder of the License.

(b) **Compliance with Rules and Policies.** This Agreement shall at all times be subject to and construed in accordance with the FCC Rules and the Communications Act. The City hereby assumes primary responsibility for complying with the Communications Act and applicable FCC Rules with respect to the Leased Channel only, and BOCHES is relieved of primary and direct responsibility for ensuring that operations on the Leased Channel complies with the Communications Act and FCC Rules. However, BOCHES shall remain responsible to comply with the Communications Act and applicable FCC Rules on Channels D1, D2 and D3 and to satisfy its minimum educational use requirements, to comply with other FCC Rules that specifically apply to BOCHES in long term *de facto* leasing arrangements, and for its own FCC Rule violations and any ongoing violations or other egregious behavior pertaining to use of the License about which it is aware. Notwithstanding the foregoing sentence, however, BOCHES' responsibility to the FCC for such matters does not relieve the City of responsibility to BOCHES for any behavior of the City inconsistent with this Agreement or with the City's responsibilities to the FCC with respect to the Leased Channel.

(c) **Secondary Markets.** City shall comply with applicable secondary markets leasing rules as set forth in Section 1.9000 *et seq.* of the FCC Rules. the City acknowledges that this Agreement may be revoked, cancelled or terminated by BOCHES or by the FCC if the City materially fails to comply with such rules; provided, however, that, except to the extent otherwise required by the FCC, before BOCHES may exercise such termination right, it shall first provide the City with notice of an Event of Default pursuant to Section 12(b) hereof, and provide the City with an opportunity to cure such default or failure as specified therein. If the Licenses are revoked, cancelled, terminated or otherwise ceases to be in effect, the City understands that it will have no continuing authority or right to use the leased spectrum.

(d) **Section 27.1214(e) Amendments.** Pursuant to Section 27.1214(e) of the FCC's Rules, on the date that is fifteen (15) years after the Effective Date and every five (5) years thereafter if such rule is effective and substantially unchanged from the Effective Date, BOCHES will have a period of ninety (90) days to request by notice to the City a review of its EBS educational needs, at which time City and BOCHES agree, for a period of ninety (90) days following BOCHES' notice, to negotiate in good faith an amendment to this Agreement that accommodates any bona fide changes in BOCHES'

educational needs, taking into account changes in technology and other relevant factors. The following will apply to any such amendment: (i) the City may accommodate changes in BOCHES' educational needs through any reasonable means available so as to avoid disruption to the Wireless Services provided by City; and (ii) the City will not be required to accommodate changes in BOCHES' educational needs in a manner that has a material negative impact on the City's operations in the Market.

(e) FCC Mandated Leasing Obligations.

(1) BOCHES and the City are familiar with the FCC Rules affecting spectrum leasing and the provision of EBS, the Communications Act of 1934, as amended ("Communications Act"), the Code of Federal Regulations, and all other applicable FCC Rules, and agree to comply with all such laws and regulations.

(2) The City assumes primary responsibility for complying with the Communications Act, and any FCC Rules that apply to the Leased Channel and License, and the Agreement may be revoked, cancelled or terminated, in accordance with Section 11, by BOCHES or by the FCC if the City fails to comply with applicable laws and regulations.

(3) Neither BOCHES nor the City will represent itself as the legal representative of the other before the FCC or any party, but will cooperate with each other with respect to FCC matters concerning the License and the Channels.

(4) If the License is revoked, cancelled, terminated or otherwise ceases to be in effect, the City has no continuing authority or right to use the Leased Channel unless otherwise authorized by the FCC.

(5) The Agreement is not an assignment, sale or transfer of the License itself.

(6) The Agreement will not be assigned to any entity that is ineligible or unqualified to enter into a spectrum leasing arrangement under the FCC Rules.

(7) BOCHES will not consent to an assignment of a spectrum leasing arrangement unless such assignment complies with applicable FCC Rules.

(8) BOCHES and the City must each retain a copy of the Agreement and make it available upon request by the FCC.

6. Consideration. As consideration for the construction of the CCSD Fiber Project for the first three (3) years of the Term, within thirty (30) days following on the Effective Date BOCHES shall pay a one-time fee to the City of \$68,225 and shall make the excess capacity on the Leased Channel available to the City for its exclusive pursuant to the terms hereof. Consideration for the fourth and fifth years of the Term shall be determined based on the outcome of the Mid-Term Meeting referenced in Section 4(a).

7. Regulatory Matters.

(a) Application for Lease Approval. Within ten (10) business days following the Effective Date of this Agreement and prior to consummating the transfer of *de facto* control of the Excess Capacity spectrum leased to the City hereunder, the parties agree to cooperate as required to prepare and file with the FCC all forms and related exhibits, certifications and other documents necessary to obtain

the FCC's consent to this Agreement and satisfy the FCC's requirements for long term *de facto* lease approval as set forth in 47 C.F.R. §1.9030(e) ("FCC Long Term Lease Application"). Each party agrees to cooperate with the other, and do all things reasonably necessary to timely submit, prosecute and defend the FCC Long Term Lease Application, including responding to any petitions for reconsideration or Commission reconsiderations of the grant of the FCC Long Term Lease Application, and will promptly file or provide the other Party with all other information which is required to be provided to the FCC in furtherance of the transactions contemplated hereby. Any fees associated with the filing of the FCC Long Term Lease Application and renewals thereof shall be paid by BOCHES. To the extent BOCHES is required to file this Agreement with the FCC, BOCHES shall first notify and consult with City, and will to the extent permitted by the FCC redact all information from the Agreement which City reasonably designates as confidential.

(b) Other FCC Filings. Upon the City's reasonable request, BOCHES shall review, execute and file (if necessary), and, together with the City, prosecute, all notifications, applications, petitions, waivers, amendments, and other related documents, including, without limitation FCC Long Term Lease Applications, necessary to secure FCC approval for the City's intended uses of the Channels, provided such filings are consistent with this Agreement and BOCHES' legal obligations. BOCHES shall review and, if consistent with this Agreement and BOCHES' legal obligations, execute and provide the City any "no objection" letters and interference consent agreements that the City may reasonably request, provided that the action requiring consent does not cause degradation of the value of the License. As an illustration, without limiting the foregoing, interference consent agreements and "no objection" letters that (i) involve fair and reciprocal rights and limitations for and on the operations of BOCHES' licensed facilities and other party's facilities in connection with system coordination at GSA boundaries, and (ii) waive FCC interference protection criteria subject to protection from actual harmful interference, taking into account topography, foliage, ground clutter and other real world factors limiting signal propagation, shall not be deemed to cause material degradation of the value of the License. During the Term, BOCHES shall not provide any "no objection" letters, interference consents and/or retransmission consents relating to the Channels to any third party without the City's prior written consent, such consent not to be unreasonably withheld.

(c) Maintenance of Channels. BOCHES shall use its best efforts to maintain in full force and effect throughout the Term its License and any associated authorizations for the Channels. BOCHES shall maintain its qualifications to hold such License(s) and authorizations, and will comply in all respects with its regulatory requirements as an FCC licensee. BOCHES agrees that it will timely file its License renewal applications and its FCC Long Term Lease Applications as provided herein and in FCC Rules. Each party shall, with respect to its activities and operations related to the Channels, comply in all material respects with all FCC Rules and all other applicable laws, rules and regulations of every kind. Each party shall provide to the other a copy of any notice received from the FCC concerning the License or the Leased Channel within five (5) business days of receipt.

8. Representations and Warranties of City.

City represents and warrants as follows:

(a) The City is a municipal corporation and City of the First Class. The City has all requisite power and authority to own its properties and to carry on its business. The City has all requisite power to execute, deliver and, subject to the regulatory authority of the FCC, perform this Agreement. The factual statements and representations contained herein are true and correct to the best of the City's knowledge and belief.

(b) All necessary actions on the part of the City to authorize the execution and delivery of this Agreement, and the performance of the obligations of the City herein, have been taken. This Agreement is valid and legally binding upon the City and enforceable in accordance with its terms except to the extent that enforceability thereof may be limited by bankruptcy, insolvency or other laws relating to the enforcement of creditor's rights or by the application of equitable principles.

(c) The execution, delivery and performance of this Agreement and all actions and transactions contemplated hereby: (i) will not violate any provision of law or of the certificate of organization or operating agreement of the City, any order of any court or other agency of government to which the City is a party or by which it or any of its properties is bound, and (ii) will not violate, be in conflict with, result in a breach of or constitute (with notice or lapse of time or both) a default under any applicable law, order or regulation, indenture, agreement or other instrument to which the City is a party or by which it or any of its properties is bound and that has not been waived or consented to, or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of its property or assets.

(d) The City is eligible and qualified under FCC Rules, including but not limited to rules relating to foreign ownership and denial of Federal benefits under the Anti-Drug Abuse Act of 1988, to lease excess capacity on the Channels pursuant to Section 1.9030 of the rules.

(e) The City is in compliance with all laws applicable to its business except non-compliance that, individually or in the aggregate, will not have a material adverse effect on its ability to lease excess capacity on the Leased Channel.

(f) There is no Proceeding now in progress or pending or, to the best knowledge of the City, threatened against the City or the assets (including the intellectual property rights) or the business of the City, nor to the best knowledge of the City, does there exist any basis therefore, except for immaterial claims brought against the City in the ordinary course of business.

9. Representations and Warranties of BOCHES.

BOCHES represents and warrants as follows:

(a) BOCHES is a Wyoming Board of Cooperative Educational Services lawfully existing and in good standing under the laws of the State of Wyoming, has all requisite power and authority to enter into this Agreement, and to perform the obligations to be performed by it under this Agreement. This Agreement constitutes a valid, binding and enforceable obligation of BOCHES. The entry into and performance under this Agreement does not and will not conflict with any other obligations or any other agreements by which BOCHES is or will be bound, or give rise to a valid cause of action for any violation thereof. The factual statements and representations contained herein are true and correct to the best of BOCHES' knowledge and belief. There is no outstanding contractual right, including a right of first refusal or option, on behalf of any third party which grants any rights with respect to leasing capacity on, or otherwise using or purchasing, the License.

(b) BOCHES holds, and is qualified to hold, the License for the Station. The License is in full force and effect. Except as has been disclosed to City, no application, action or proceeding is pending for the renewal or modification of the License, and, except for actions or proceedings affecting EBS facilities generally, no application, action or proceeding is pending or threatened that could reasonably be expected to result in the: (i) denial of an application for renewal, (ii) the revocation, adverse modification (as determined by City), non-renewal or suspension of the

License, (iii) the issuance of a cease-and-desist order, or (iv) the imposition of any fines, forfeitures or other administrative or judicial sanctions relating to the operation of the Channels.

(c) BOCHES holds the License free and clear of any mortgage, lien, pledge, charge, security interest, right of first refusal or right of others therein, or encumbrance of any nature whatsoever in respect of such asset. No third party other than BOCHES has any right, title or interest in or claim to the Leased Channel.

(d) BOCHES is in compliance with all laws applicable to the License except for any non-compliance that, individually or in the aggregate, will not have a material adverse effect on the License.

(e) There is no Proceeding now in progress or pending or, to the best knowledge of BOCHES, threatened against BOCHES with respect to the License, nor to the best knowledge of BOCHES, does there exist any basis therefore, except for immaterial claims brought against BOCHES in the ordinary course of business. BOCHES is not subject to any order, writ, injunction or decree of any court of any federal, state, municipal or other domestic or foreign governmental department, commission, board, bureau, agency or instrumentality which affects the Licenses or BOCHES' ability to enter into this Agreement and perform its obligations hereunder.

10. Termination; Default; Loss; Survival.

(a) **Termination.** This Agreement may be terminated prior to expiration of the Term under any of the following circumstances: (i) by mutual written agreement of the parties; (ii) by BOCHES upon giving written notice to the City of an Event of Default (as hereinafter defined); (iii) by the City, upon giving written notice to BOCHES in the Event of Default, including but not limited to a failure of BOCHES to meet its "substantial service" obligations as specified in Section 3(c); (iv) by either party, upon giving written notice to the other party, within thirty (30) days of a Loss (as hereinafter defined); and (v) by either party upon giving written notice to the other party if the parties are unable to negotiate the amendment described in Section 5(d) within the specified ninety- (90-) day negotiation period, provided that any such termination under Section 10(a)(v) must take place within thirty (30) days following such ninety- (90-) day period. If the Agreement is terminated prior to the expected termination date which was disclosed to the FCC, BOCHES shall file a notification with the FCC no later than ten (10) days after the early termination indicating the date the Agreement was terminated.

(b) **Default.** It shall be an "Event of Default" hereunder if either party fails to perform a material obligation or breaches a material representation and warranty contained in this Agreement in circumstances where such failure results in the inability of the other party to exercise its full rights under this Agreement, and the defaulting party fails to cure such default within thirty (30) days following the receipt of written notice of a default; provided however, that in the event that the FCC requires termination of this Agreement, or in the event that the authorizations for the Channels are jeopardized by a delay in termination, the Agreement may be terminated by the non-defaulting party within the time frame for notice and termination required by the FCC or otherwise necessitated by preservation of such authorizations.

(c) **Loss.** The term "Loss" means: (i) expiration of a License without renewal; (ii) License termination or revocation by the FCC without reinstatement; or (iii) the unavailability of the Leased Channel for the provision of the City's Wireless Services due to regulatory action, including, but not limited to, FCC denial of the FCC Long Term License Application related to this Agreement, or reallocation of the Channels for purposes incompatible with the City's business, or adoption of rules or policies that substantially frustrate achievement of the purposes of this Agreement. A Loss shall not be

deemed a default by BOCHES or the City if the Loss was beyond the reasonable control of such party, and such party used its best efforts to preserve the Licenses.

(d) **Survival of Expiration or Termination.** The obligations of the parties under this Agreement that by their nature would continue beyond expiration or termination of this Agreement shall survive any expiration or termination of this Agreement.

11. Indemnification; Insurance; Limitation of Liability.

(a) **Scope of Indemnification by the City.** The City shall defend, indemnify and hold BOCHES harmless from any and all costs and expenses, including reasonable attorney's fees, arising from any inaccuracy or misrepresentation of any representation or warranty made by City herein, or any failure by the City to perform or comply with any covenant in this Agreement to be performed or complied with by the City, or any claim based on the City's construction and/or operation of the Wireless System and its offering and provision of services thereon.

(b) **Scope of Indemnification by BOCHES.** To the extent permitted by law, BOCHES shall defend, indemnify and hold the City harmless from any and all costs and expenses, including reasonable attorney's fees, arising out of or resulting from any inaccuracy or misrepresentation of any representation or warranty made by BOCHES herein or any failure by BOCHES to perform or comply with any covenant in this Agreement to be performed or complied with by BOCHES.

(c) **Indemnification Procedures.** In claiming indemnification pursuant to this Agreement the party seeking indemnification shall, with respect to any claim for which indemnification is available, notify the indemnifying party in writing of the nature of the claim as soon as practicable. (The failure by the party seeking indemnification to give notice as provided, above, shall not relieve the indemnifying party of its obligations under this Section, except to the extent that the failure results in the failure of actual notice and the indemnifying party is damaged as a result of the failure to give notice.) Upon receipt of notice of the assertion of a claim, the indemnifying party shall assume the defense of the claim. The party seeking indemnification shall have the right to employ separate counsel and to participate in (but not control) any such action, but the fees and expenses of such counsel shall be at the expense of the party seeking indemnification unless (a) the employment of counsel by the party seeking indemnification has been authorized by the indemnifying party, (b) the party seeking indemnification has been advised by its counsel in writing that there is a conflict of interest between the indemnifying party and the party seeking indemnification in the conduct of the defense of the action (in which case the indemnifying party shall not have the right to direct the defense of the action on behalf of the party seeking indemnification), or (c) the indemnifying party has not in fact employed counsel to assume the defense of the action within a reasonable time following receipt of the notice given pursuant to this Section, in each of which cases the fees and expenses of such counsel shall be at the expense of the indemnifying party. The indemnifying party shall not be liable for any settlement of an action effected without its written consent (which consent shall not be unreasonably withheld), nor shall the indemnifying party settle any such action without the written consent of the party seeking indemnification (which consent shall not be unreasonably withheld). The indemnifying party shall not consent to the entry of any judgment or enter into any settlement that does not include as an unconditional term thereof the giving by the claimant or plaintiff to the party seeking indemnification a release from all liability with respect to the claim. Each party shall cooperate in the defense of any claim for which indemnification is available and shall furnish such records, information, testimony and attend such conferences, discovery proceedings, hearings, trials and appeals as may reasonably be requested by the other party.

(d) **Limitation of Liability.** Except with respect to indemnification for third party claims, neither party, its affiliates, directors, officers, employees or agents shall be responsible or liable to

the other for any indirect, incidental, consequential, special, exemplary, punitive or other damages, or for any loss of profits, loss of revenue, loss resulting from interruption of business or loss of use or data, even if the party, its affiliates, directors, officers, employees or agents have been advised of the possibility of such damages, and notwithstanding any failure of essential purpose of any limited remedy of any kind, under any contract, negligence, strict liability or other theory, arising out of or relating in any way to this Agreement or its implementation.

12. No Joint Venture.

Notwithstanding any other provisions of this Agreement, the parties intend by this document to enter a use agreement and not to create a joint venture and will carry out this Agreement to preserve that intent. Neither party is, nor shall either party hold itself out to be, vested with any power or right to contractually bind, act on behalf of the other as its contracting broker, agent or otherwise for committing, selling, conveying or transferring any of the other party's assets or property, contracting for or in the name of the other party, or making any contractually binding representations as to the other party that shall be deemed representations contractually binding upon such party.

13. Force Majeure.

Except with respect to the obligation to make payments hereunder, neither BOCHES nor the City shall be deemed in default or otherwise liable hereunder due to either party's inability to perform by reason of any fire, earthquake, flood, substantial snowstorm, epidemic, accident, explosion, casualty, strike, lockout, labor controversy, riot, civil disturbance, act of public enemy, embargo, war, Act of God, or any municipal, county, state or national ordinance or law, or any executive, administrative or judicial order (which order is not the result of any act or omission that would constitute a default hereunder), or the failure of any municipal, county, state or national agency or department, including without limitation the FCC, to act in a timely manner on any application or request before such agency which would permit the performance of the party hereto, or the inability of BOCHES or the City to obtain the necessary consents, after use of commercially reasonable efforts, of third parties to the performance of the party hereto, or any failure or delay of any transportation, power or other essential thing required, or similar causes beyond either party's control.

14. Confidential Information.

Pursuant to this Agreement and the performance thereof, either party may receive non-public proprietary information relating to the plans and/or operations of the other party and its affiliates, parents and subsidiaries ("Confidential Information"). Confidential Information includes, but is not limited to, information regarding vendors, customers and lender arrangements, line-of-sight and other customer calculations, leasing terms and arrangements, product/service specifications, prototypes, computer programs, models, drawings, acquisition plans, financing plans and arrangements, marketing plans, business plans, financial data, personnel statistics and any similar non-public or otherwise confidential or sensitive information. Neither party shall use for itself, except in performance or enforcement of the Agreement, or disclose to any third person, firm, corporation or other entity any Confidential Information, except (a) information that was gained independent of the party's relationship with the other party and become publicly available through no breach of any obligation of confidentiality by the party; (b) information that is communicated to a third party with the prior written consent of the other party; or (c) information that is required to be disclosed pursuant to the lawful order of a government agency or disclosure that is required by operation of law. In the event of a breach or threatened breach of the terms of this Section, the disclosing party shall be entitled to seek an injunction prohibiting any such breach. Any such injunctive relief shall be in addition to, and not in lieu of, any appropriate relief in the way of money damages or any other remedies available at law or in equity.

15. Notices.

All notices, requests, consents and other communications hereunder shall be in writing, shall be effective upon receipt and shall not be deemed valid unless given or served in writing and forwarded by mail, postage pre-paid, addressed as follows:

If to BOCHES, to: Board of Cooperative Higher Educational Services
Box 3033
Gillette, Wyoming 82717
Attn: Executive Director

If to City, to: City of Gillette
P.O. Box 3003
Gillette, Wyoming 82717-3003
Attn: City Attorney
With a copy to the IT Manager

provided, however, that if any party shall have designated a different address by notice to the others, then to the last address so designated.

16. Assignment/Transfer of Control.

(a) **Eligibility for Transfer or Assignment.** BOCHES shall not assign its interest in this Agreement or the License to any person or entity that is not eligible or qualified to hold the Licenses or lease the Leased Channel under applicable FCC Rules. The City shall not assign its interest in this Agreement and will not enter into spectrum subleasing arrangements for the spectrum subject to the Licenses with any person or entity that is not eligible or qualified to lease the spectrum under applicable FCC Rules.

(b) **City Assignment.** Pursuant to Section 1.9030(h) of the FCC Rules, the City may assign this Agreement to another entity, provided that (other than for assignments that are *pro forma*) BOCHES has consented to such assignment (such consent not to be unreasonably withheld, delayed or conditioned), the assignee agrees in writing to assume the City's obligations under this Agreement, and the assignment of the Agreement is approved by the FCC.

(c) **BOCHES Assignment.** BOCHES may, during the Term, assign its License or individual Channels to any governmental entity, any qualified entity affiliated with BOCHES (such as a supporting foundation), any bona fide local private educational institution, any public broadcast station BOCHES, or any entity with which City already has an EBS lease relationship, so long as such entity assumes and agrees to be bound by the terms of this Agreement and the FCC has consented to the assignment of the *de facto* spectrum leasing arrangement reflected in this Agreement. BOCHES may assign its License to any other EBS eligible with the consent of the City, not to be unreasonably withheld, delayed or conditioned. BOCHES, successor BOCHES and the City shall cooperate in filing with the FCC any and all paperwork necessary to assign the License to the successor BOCHES and receive continued FCC consent, if necessary, to the long term *de facto* spectrum leasing arrangement reflected in this Agreement.

(d) **City Sublease.** The City shall have the right to sublease capacity on the Wireless System (but not sublease the Leased Channel apart from its operation on the Wireless System) in accordance with FCC Rules, but no such sublease shall relieve the City of any responsibility for compliance with all of the City's obligations under this Agreement.

(e) **BOCHES Release.** Upon the valid consummation of the sale, assignment or transfer of the License to any third party as described in this Section, the execution by such third party of an assignment and assumption agreement with respect to this Agreement, and the expiration of any applicable FCC reconsideration periods for such assignment or transfer: (i) BOCHES will be released and discharged from all obligations to City arising thereafter; and (ii) BOCHES will not incur any penalties as a result of and will not be responsible for any of the City's expenses associated with the sale, assignment or transfer, except that nothing shall release BOCHES from any liabilities incurred prior to the execution of such assignment and assumption agreement.

17. Waivers.

Any waiver by any party of any breach of or failure to comply with any provision of this Agreement by the other party shall not be construed as or constitute a continuing waiver of such provision, or a waiver of any other breach of, or failure to comply with, any other provision of this Agreement.

18. Complete Agreement.

This Agreement sets forth the entire understanding of the parties hereto and supersedes all prior agreements and communications, whether oral or written, by any party (or any officer, employee or representative of any party).

19. Construction.

The headings of the Sections of this Agreement are inserted for convenience of reference only and shall not be deemed to constitute a part hereof. Unless otherwise stated, references in this Agreement to Sections refer to the Sections of this Agreement.

20. Amendment; Termination.

This Agreement may not be amended or modified orally but only by an instrument in writing duly executed by the parties.

21. Counterparts.

More than one counterpart of this Agreement may be executed by the parties hereto, and each fully executed counterpart shall be deemed an original.

22. Severability.

The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement. In the event that any provision of this Agreement is determined to be invalid, unenforceable or otherwise illegal, such provision will be deemed restated, in accordance with applicable law, to reflect as nearly as possible the original intentions of the parties, and the remainder of the Agreement will be in full force and effect.

23. Dispute Resolution Procedures.

The parties intend to minimize the potential for litigation or other formal means of enforcing this Agreement. Accordingly, the parties agree that the following dispute resolution procedures shall be invoked prior to either party instituting legal proceedings (except for injunctive relief as provided for

below) against the other. Either party (the "Complaining Party") may declare a dispute under this Agreement by written notification to the other party (the "Responding Party"), setting forth in reasonable detail the dispute for which the Complaining Party seeks redress, along with a specific request for relief. The Responding Party shall have 10 business days from receipt to provide a written reply. The reply shall contain a response to the allegations contained in the notice or an agreement to provide the relief requested. Upon receipt of the reply, the Complaining Party shall provide written notice to the Responding Party either that the dispute has been resolved satisfactorily or that the Complaining Party is invoking the following escalation procedure. In the event that the parties are unable to resolve a dispute in the manner described above, each party agrees to designate a single representative to attempt to resolve the dispute. Each party's representative shall be a senior executive (the equivalent of a senior vice president or higher) who shall have all necessary authority to bind the party contractually and to resolve the dispute. The designated representatives shall meet for a minimum of eight hours at a location to be mutually agreed upon by the parties, in an effort to resolve the dispute. In the event that mutual agreement regarding the location of such meeting cannot be reached, the meeting will take place at BOCHES' offices. Notwithstanding anything to the contrary in this Section 23, either party may seek injunctive relief from a court of competent jurisdiction pursuant to Section 25 at any time without complying with the foregoing provisions.

24. Governing Law.

This Agreement shall be governed by and construed in accordance with the laws of the State of Wyoming applicable to contracts made and wholly performed within Wyoming by persons domiciled in Wyoming.

25. Specific Performance.

The parties acknowledge and agree that the rights reserved to each of them hereunder are of a special, unique, unusual and extraordinary character, and that irreparable harm would occur in the event that any of the agreements and provisions of this Agreement were not performed fully by the parties hereto in accordance with their specific terms or conditions or were otherwise breached, and that money damages are an inadequate remedy for breach of the Agreement because of the difficulty of ascertaining and quantifying the amount of damage that will be suffered by the parties hereto in the event that this Agreement is not performed in accordance with its terms or conditions or is otherwise breached. It is accordingly hereby agreed that each party hereto shall be entitled to an injunction or injunctions to restrain, enjoin and prevent breaches of this Agreement by the other party and to enforce specifically such terms and provisions of this Agreement in any state or federal court of the United States having jurisdiction and venue, such remedy being in addition to and not in lieu of, any other rights and remedies to which the other parties are entitled to at law or in equity. The non-prevailing party shall pay its own expenses, court costs and the expenses, including without limitation, attorneys' fees and costs, and expert witness fees incurred by the other party.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers as of the date first written above.

**BOARD OF COOPERATIVE HIGHER
EDUCATIONAL SERVICES**

By: _____
Name: Dr. David Fall
Title: Chairman

THE CITY OF GILLETTE, WYOMING

By: _____
Name: _____
Title: _____

EXHIBIT A

Connection Specifications Narrative

Lakeway Learning Center

Coming from the vault on Lakeway at the west driveway entrance to the Learning Center underground along the west side of the building to the back. Going east along the back to that wall outside of the server room (Rm. 113), come through the wall on the east side of the room over the door and terminate on the wall near the north corner.

South Campus High School

Fiber is already there, need to terminate on the east wall (Rm. 136).

Sage Valley

Coming from Pump Station 3 fiber vault underground, go under Lakeway headed for Planetarium Walkway/Stairway down to 2nd floor. Through the Brick wall enter the storage area underneath the Planetarium, terminating on the south wall next to the power outlets.

Paintbrush

Coming from the Pump Station 3 fiber vault underground, down the hill paralleling Lakeway road until to the north east parking area. Head towards the Electrical Room (Rm. 147) coming through the brick wall along the east wall going through another wall to the phone room (Rm. 146), terminating on the east wall. Watch for Sewer from Modular, gas, and power headed out to parking lot island.

Sunflower

Coming from fiber vault on 4-J, head up 4-J to the north side of Walnut, crossing 4-J. Run up Walnut to Sunflower, heading to the southeast facing corner classroom (Rm. 120). Coming through the exterior wall (Steel with brick facade), via the ceiling heading northwest to the vocal music room (Rm. 124). Turning and heading northeast across the hall to the Conference Room (Rm. 127) next to the Office, terminating on the northeast wall. Watch for coming off of southwest corner of classroom.

Twin Spruce

Coming off of vault right next to Twin Spruce underground, heading northwest to the exterior wall of the mechanical room. Come through the wall and terminate on the east wall of the room, if gas line allows. Otherwise, coming off of the vault right next to Twin Spruce underground to the west through the boiler room brick wall, over the door, through the mechanical room brick wall, terminating on the east wall. Watch for gas line.

Educational Services Center

Coming off of the Burma Overpass Vault, underground along 6th Street to Tyler Avenue, head south to the front of the Building. Head west towards just north of the walk in entryway, entering building in the basement, termination on the south wall.

Meadow Lark

Bring fiber from the overhead of Gurley going underground along 8th Street on the north side, crossing Green Avenue. Head for the east wall of the Boiler Room, going through brick wall into the boiler room, following that wall north going through another brick wall into the termination closet on the wall. Watch from storm drain from the roof coming off the south east corner of the school headed south.

North Campus High School

Bring Fiber down Gurley on the overhead, going underground on south side of 12th Street. Following along Fence line then curving in towards the south side of the garage doors of the "G" Building. Go through the brick wall. Conduit along the wall to the rafters, going along the rafters to the west then to the south going through another brick wall to the termination point on the wall with the Campus's Multimode fiber. Watch for Gas and New Water line coming off of north side of building at angles.

Hillcrest

Bring fiber from North Campus South End 2nd Floor computer Lab wall termination (where multimode fiber terminates) across upper football field down through drainage area to west end of school, following drive till reaching the west door, enter building south of the west door through a brick wall, going through the ceiling of the classroom. Going through a firewall into the telecomm room terminating in the rack. Watch for Storm drain from roof and irrigation at south campus and irrigation at Hillcrest.

Wagonwheel

Bring Fiber from the Warehouse vault underground along 4th Avenue to the east side of the school. Heading south to the area near the boiler room, turning west and entering the building north of the boiler room doors (Rm. 116), up along the rafters entering the phone room(Rm. 117) and terminating on the wall at the west end.

Aquatic Center

Come from Gurley vault along 69 line. Bring Fiber down from overhead on the Warlow line near the north east corner of the building, heading south to the northeast corner of the building. Entering building at the Boiler room going through another wall into the Electrical Room, terminating on the north wall.

Lakeway

Come from Vault at Aquatic Center along 69 line. Bring fiber down from the overhead on the Warlow line at Osborne Avenue to underground, headed south to Lakeside Drive. Parallel the northwest side of the building until reaching the second entryway. Entering the building through the exterior wall into the phone room (Rm. 129), terminating on the wall near the door.

Pronghorn

Bring fiber down from the overhead on 69 line west run at Oakcrest underground (either at Meadow Ln or Lakeway, depending on final plans). Following Oakcrest south until the north entrance to Pronghorn School, following drive around to the northwest corner of the school. Entering the school via the crawlspace, using the crawlspace to get to the telecomm room at the south side of the library, coming up through the floor (this will also have to be done) and terminating on the wall.

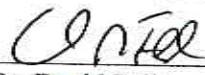
EXHIBIT B

WiMax Construction Plan


Year 1	Location	Est. Cost	City Contribution	Difference	Comments
	CCHS South	\$150.00			
	Sage Valley Jr. High	\$6,915.00			
	Paintbrush Elementary	\$11,495.00			
	Twin Spruce Elementary	\$3,210.00			
	Lakeway Learning Center	\$10,135.00			
	Total Year 1 costs =	\$31,905.00	\$35,000.00	\$3,095.00	
Year 2					
	ESC	\$20,630.00			Assumed completion of Burma fiber line
	Meadowlark Elementary	\$40,990.00			Assuming completion of 4th Street fiber line
	CCHS North	\$29,325.00			Assuming completion of Meadowlark connection
	Total Year 2 costs =	\$90,945.00	\$35,000.00	(\$55,945.00)	
Year 3					
	Sunflower Elementary	\$35,225.00			From 4-J to Walnut
	Hillcrest Elementary	\$31,765.00			From North Campus
	Wagonwheel Elementary	\$36,235.00			From 14-16/RR overpass vault
	Total Year 3 costs =	\$103,225.00	\$35,000.00	(\$68,225.00)	
Year 4					
	Lakeview Elementary	\$27,310.00			Assumed completion of Warlow fiber line
	Aquatic Center	\$21,220.00			Assumed completion of Warlow fiber line
	Total Year 4 costs =	\$48,530.00	\$35,000.00	(\$13,530.00)	
Year 5					
	Pronghorn Elementary*	\$36,530.00			*If from Meadow vault, cost changes to \$12,180
	Total Year 5 costs =	\$36,530.00	\$35,000.00	(\$1,530.00)	
	Projected Total	\$311,135.00			
	Total 5-year net cost to BOCHES			(\$136,135.00)	

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers as of the date first written above.

**BOARD OF COOPERATIVE HIGHER
EDUCATIONAL SERVICES**

By: 
Name: Dr. David Fall
Title: Chairman

THE CITY OF GILLETTE, WYOMING

By: 
Name: Duane Evenson
Title: Mayor