

## FACILITIES USE AND LICENSE AGREEMENT

This Facilities Use and License Agreement (this "Use Agreement") is dated this \_\_\_\_ day of \_\_\_\_\_, 2000 (the "Effective Date"), and entered into by and between the City of Milwaukee, a Wisconsin municipality (the "City"), and Metricom, Inc., a Delaware corporation ("Metricom").

### Recitals

A. Metricom owns, maintains and operates, in accordance with regulations promulgated by the Federal Communications Commission, a mobile digital data communications radio network known as Ricochet, utilizing Radios (as defined in § 1.8 below) and related equipment certified by the Federal Communications Commission.

B. For purposes of operating Ricochet, Metricom wishes to locate, place, attach, install, operate and maintain Radios on facilities owned by the City, which are located within the Municipal Right-of-Way (as defined in § 1.7 below).

### Agreement

Now, Therefore, In consideration of the above recitals, which are incorporated herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree to the following covenants, terms and conditions:

1. Definitions. The following definitions shall apply generally to the provisions of this Use Agreement:

1.1 Adjusted Gross Revenues. "Adjusted Gross Revenues" means any and all revenue, whether received in the form of cash, credits, barter, trade, property or consideration of any kind or nature, which is either: (a) received by Metricom for its Services (as defined in sec. 1.10 below) provided to subscribers with billing addresses in the City, or (b) received by Metricom for its Services provided to subscribers with billing addresses in the City when such services are provided to such subscribers by an entity which has contracted with Metricom to provide Metricom Services excluding (i) local, state or federal taxes that have been billed to the subscribers and separately stated on subscribers' bills; and (ii) revenue uncollectible from subscribers (i.e., bad debts) with billing addresses in the City that was previously included in Adjusted Gross Revenues. This definition is intended to reach as broadly as possible to encompass all revenue.

1.2 City. "City" means the City of Milwaukee.

1.3 Fee. "Fee" means any assessment, license, charge, fee, imposition, tax or levy of general application to entities doing business in the City lawfully imposed by any governmental body.

1.4 Installation Date. “Installation Date” shall mean the date that the first Radio is installed by Metricom pursuant to this Use Agreement.

1.5 Laws. “Laws” means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders, certificates, orders, or other requirements of the City or other governmental agency having joint or several jurisdiction over the parties to this Use Agreement.

1.6 Metricom. “Metricom” means Metricom, Inc., a corporation duly organized and existing under the laws of the State of Delaware, and its lawful successors, assigns and transferees.

1.7 Municipal Facilities. “Municipal Facilities” means City-owned street light poles, lighting fixtures, electroliers, or other City-owned structures located within the Municipal Right-of-Way and may refer to such facilities in the singular or plural, as appropriate to the context in which used.

1.8 Municipal Right-of-Way. “Municipal Right-of-Way” means the space in, upon, above, along, across and over the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes, and places, including all public utility easements and public service easements as the same now or may hereafter exist, that are under the jurisdiction of the City. This term shall not include county, state or federal rights-of-way or any non-dedicated property owned by any person or entity other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such person or entity.

1.9 Radio. “Radio” means the Radio frequency devices, whether referred to singly or collectively, to be installed and operated by Metricom hereunder pursuant to 47 C.F.R. Part 15.

1.10 Services. “Services” means all wireless internet access services provided through Ricochet by Metricom and any related set up fees, excluding telephony and cable television.

## 2. Term.

a. Initial Term. This Use Agreement shall be for an initial term of 10 years (“Initial Term”), commencing on the date first above written, (the “Execution Date”).

b. Option to Extend. Metricom shall have the option to extend the term of this Use Agreement for two (2) additional periods of five (5) years (each additional five (5) year period being an “Option Term”), upon written notice to City of Metricom’s intention to exercise its option, at least one hundred and eighty (180) days before the expiration of the Initial Term, or each succeeding Option Term.

At least one hundred and eighty (180) days before the expiration of the Initial Term and each Option Term thereafter, City and Metricom shall in good faith commence negotiations toward extending the term of the Use Agreement for an additional Option Term of five (5) years,

including renegotiation of the rental amount. If, at the end of the Initial Term and each Option Term thereafter, City and Metricom have not executed an amendment to this Use Agreement modifying the term as herein described, this Use Agreement shall be deemed to have been extended by the parties for an additional Option Term at the then current Annual Fee amounts increased by 10% for each year of the five (5) year extension, unless either Metricom or City notifies the other in writing at least sixty (60) days before the expiration of such Option Term, that it chooses to terminate this Use Agreement rather than have it extended.

c. The term “license” in this Use Agreement is not meant to imply that the City has the right to terminate this Use Agreement at will. It is the intention of the parties that this Use Agreement may only be terminated by the specific provisions contained herein.

3. Scope of Use Agreement. Any and all rights expressly granted to Metricom under this Use Agreement, which shall be exercised at Metricom’s sole cost and expense, shall be subject to the prior and continuing right of the City under applicable Laws to use any and all parts of the Municipal Right-of-Way exclusively or concurrently with any other person or entity and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title of record which may affect the Municipal Right-of-Way. Nothing in this Use Agreement shall be deemed to grant, convey, create, or vest in Metricom a real property interest in land, including any fee, leasehold interest or easement. Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the City, as provided in sec. 5 of this Use Agreement.

3.1 Attachment to Municipal Facilities. The City hereby authorizes and permits Metricom, as a licensee, to enter upon the Municipal Right-of-Way and to locate, place, attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Radios in (“in” should not imply “inside” any City boxes or cabinets) or on Municipal Facilities for the purposes of operating Ricochet and providing Services. In addition, subject to the provisions of § 4.2 below, Metricom shall have the opportunity to draw electricity for the operation of the Radios from the power source associated with each such attachment to Municipal Facilities.

3.2 No Interference. Metricom in the performance and exercise of its rights and obligations under this Use Agreement shall not interfere in any manner with the existence and operation of any and all public and private rights of way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable Laws or this Use Agreement.

3.3 Compliance with Laws. Metricom shall comply with all applicable Laws in the exercise and performance of its rights and obligations under this Use Agreement.

3.4 Obtaining Required Permits. If the attachment, installation, operation, maintenance or location of the Radios in the Municipal Right-of-Way shall require any permits, Metricom shall, if required under applicable City ordinances, including but not limited to Chapter 115, Milwaukee Code of Ordinances, apply for the appropriate permits and pay any standard and

customary permit fees and shall perform any duties or other obligations imposed by those permits. City shall promptly respond to Metricom's requests for permits and shall otherwise cooperate with Metricom in facilitating the deployment of Ricochet in the Municipal Right-of-Way in a reasonable and timely manner.

4. Compensation; Utility Charges. Metricom shall be solely responsible for the payment of all lawful Fees in connection with Metricom's performance under this Use Agreement, including those set forth below.

4.1 Annual Fee.

As compensation for the use of the Municipal Facilities and not as tax levied or collected on income within the meaning of sec. 66.70, Stats., Metricom shall pay to the City, an Annual Fee payable semi-annually within 45 days after each semi-annual anniversary of the Execution Date for license occupancy of Municipal Facilities during that prior semi-annual period, except for the first semi-annual period where the Annual Fee shall be prorated based on the portion of the period from the Installation Date to the semi-annual payment date. The Annual Fee shall be:

(a) an amount equal to the annual per attachment fee computed in accordance with Section (i) and (ii) below times the number of Municipal Facilities used by Metricom pursuant to the terms of this Agreement. This is the "Attachment Method" of computing the Annual Fee. For purposes of computing the Annual Fee, the number of attachments shall be determined on the last day of each semi-annual payment period. The Attachment Method shall be computed as follows:

(i) The Annual Fee for Municipal Facilities which are solely City owned shall be One Hundred and Ten Dollars (\$110.00) per facility attachment.

(ii) The Annual Fee for Municipal Facilities, such as mastarms, located on utility poles owned by the Wisconsin Electric Power Company ("WEPCO") shall be computed at 50% of the rates set forth in Section 4.1(a)(i) above. Metricom recognizes that in order to attach to such Municipal Facilities on WEPCO owned poles, it must also obtain permission to do so from WEPCO. Further, the permission which the City is hereunder granting to attach to Municipal Facilities on WEPCO owned poles is specifically subject to WEPCO's agreement that such attachment will not modify, diminish or otherwise alter the agreement between WEPCO and the City which allows the City to attach to the WEPCO owned poles.

(iii) Metricom's attachment to other non-City owned facilities in the public right-of-way shall be subject to all applicable state and local laws and regulations including, but not limited to, obtaining and making required payments for all necessary permits and special privileges for right-of-way occupancy. Metricom shall not, however, be required to pay the Annual Fee herein established for attachments to such non-City owned facilities in the right-of-way.

(iv) The Fee Schedule set forth in Section 4.1(a)(i) and (ii) above shall be annually increased by 6%; or

Schedule set forth in Section 4.1(a)(i) and (ii) above shall be annually increased by 6%;  
or

(b) Once during the Initial Term, the City may elect an alternative to the sec. 4.1(a) Attachment Method of computing the Annual Fee. This alternative fee shall be an amount equal to two percent (2%) of Adjusted Gross Revenues plus the per attachment fee set forth in sec. 4.1(b)2 below. This is the "Revenue/Attachment Method" of computing the Annual Fee. The Annual Fee computed in accordance with the Revenue/Attachment Method shall be payable semi-annually within 45 days after each semi-annual anniversary of the Execution Date. Metricom shall furnish to the City with each payment of compensation done under the Revenue/Attachment Method, a statement, executed by an authorized officer of Metricom or his or her designee, showing the amount of Adjusted Gross Revenues for the period covered by the payment. If Metricom discovers any error in the correct amount of compensation due, the City shall be paid within thirty (30) days of discovery of the error or determination of the correct amount. Any overpayment to the City through error or otherwise shall be refunded or offset against the next payment due. Acceptance by the City of any payment due under this section shall not be deemed to be a waiver by the City of any breach of this Use Agreement occurring prior thereto, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due or from collecting any balance due to the City. Notwithstanding anything to the contrary in this Use Agreement, if the Services are subject to a utility users tax, communications tax, or other similar tax or fee which accrues to the City by operation of the City's Municipal Code or other applicable law, then the amount of the Right-of-Way Fee shall be reduced by the amount of the applicable utility users tax, communications tax, or such other similar tax or fee; and

(b) 2. A fee payable annually within 45 days after each semi-annual anniversary of the Installation Date for license occupancy of Municipal Facilities during that prior semi-annual period. The fee shall be an amount equal to the annual per attachment fee set forth in subsections (i) and (ii) below times the number of Municipal Facilities used by Metricom pursuant to the terms of this Agreement. For purposes of computing the Annual Fee, the number of attachments shall be determined on the last day of each semi-annual period. This element of the Revenue/Attachment Method shall be computed as follows:

(i) The Fee for Municipal Facilities which are solely City owned shall be Sixty Dollars (\$60.00) per facility attachment, increased from the Execution Date as provided in Section 4.1(b)2.(iv) below.

(ii) The Fee for Municipal Facilities, such as mastarms, located on utility poles owned by the Wisconsin Electric Power Company ("WEPCO") shall be computed at 50% of the rates set forth in Section 4.2(b)2(i) above. Metricom recognizes that in order to attach to such Municipal Facilities on WEPCO owned poles, it must also obtain permission to do so from WEPCO. Further, the permission which the City is hereunder granting to attach to Municipal Facilities on WEPCO owned poles is specifically subject to WEPCO's agreement that such attachment will not modify, diminish or otherwise alter the agreement between WEPCO and the City which allows the City to attach to the WEPCO owned poles.

(iii) Metricom's attachment to other non-City owned facilities in the public right-of-way shall be subject to all applicable state and local laws and regulations including, but not limited to, obtaining and making required payments for all necessary permits and special privileges for right-of-way occupancy. Metricom shall not, however, be required to pay the Annual Fee herein established for attachments to such non-City owned facilities in the right-of-way.

(iv) The Fee Schedule set forth in Section 4.1(b)2(i) and (ii) above shall be annually increased by 6%.

(c) City represents and covenants that City owns all Municipal Facilities for the use of which it is collecting the Annual Fee computed in accordance with either § 4.1(a) or (b).

4.1.1 Accounting Matters. Metricom shall keep accurate books of account at its principal office in San Jose or such other location of its choosing for the purpose of determining the amounts due to the City under § 4.1 above. Metricom shall provide for City inspection of Metricom's books of account relative to its operations in the City at Metricom's nearest regional office or if that regional office is not within 150 miles of City Hall, i.e., 200 E. Wells Street, Milwaukee, Wisconsin 53202, at a location designated by the City of Milwaukee not more than 150 miles from City Hall. Metricom agrees to assist the City in compliance with any request for information to which the City must respond by Law. Notwithstanding the above, Metricom shall provide the City with any and all information concerning Metricom's Adjusted Gross Revenues which the City Comptroller deems necessary to make the decision on the use of the Revenue/Attachment Method described in Section 4.1(b) above. Such information shall be provided at a time and place designated by the City Comptroller.

4.2 Electricity Charges. Metricom shall be solely responsible for the payment of all electrical utility charges, including the cost of metering, to the City, if the City provides the electricity or the applicable utility company based upon the Radios' usage of electricity and applicable tariffs.

4.3 Municipal Access Program. In consideration of the execution and delivery of an Agreement, the City shall have the right throughout the term of this Use Agreement to receive up to the maximum number specified below (based upon the City's population) of free Ricochet Internet Access subscriptions. These subscriptions allow for Internet access and e-mail. Service such as newsgroups, LAN access, and dial-in Internet access will not be provided by Metricom, but may be obtained through an authorized Ricochet service provider, at the City's expense. The number of free subscriptions which the City may receive shall be determined in accordance with the City's official population at the time this agreement is signed, as shown on the latest available census data. The number of subscriptions allowed per population are as follows:

<u>Population Size</u>	<u>Maximum Subscriptions</u>
< 9,999	2
10,000 - 24,999	3

25,000 – 49,999	4
50,000 – 74,999	5
75,000 – 99,999	6
200,000 – 299,999	12
300,000 – 399,999	14
400,000 – 499,999	16
500,000 +	20

City shall designate one person who shall be responsible for ordering and receiving any subscriptions. To take advantage of this program, the designated individual should contact Metricom’s nearest Office. City’s right to use the subscriptions shall commence at the time the Ricochet service is commercially available in the City and shall extend until the expiration of the term of this Use Agreement or through the length of time that Radios are deployed in the Municipal Right-of-Way, whichever is shorter. City’s use of the subscriptions shall be subject to the standard Ricochet terms and conditions of use or of the chosen retailer of the Ricochet services whichever the City obtains service. City understands and agrees that modems and equipment required to utilize the subscriptions and any additional service subscriptions or service options the City may desire will need to be obtained from an authorized retailer at market rates current from time to time. City shall use all and shall not be entitled to resell, distribute, or otherwise permit the use of same by any other person, excepting a local public entity that provides public service within the corporate boundaries of the City (e.g., municipal schools, public safety, or fire departments, etc.).

4.4 Most-Favored Municipality Clause. Should Metricom after the parties’ execution and delivery of this Use Agreement enter into a right-of-way permit and facility use agreement with another Wisconsin municipality of the same size or smaller than the City in the Wisconsin counties of Kenosha, Milwaukee, Ozaukee, Racine or Waukesha, which agreement contains either (a) a higher Annual Fee as described in § 4.1 above, City shall have the right to request that Metricom modify this Use Agreement to incorporate the same or substantially similar superior benefits and such other terms.

4.5 Reimbursement of City’s Project Review Expenses. Metricom shall reimburse the City at City’s standard rates for all reasonable project review expenses relating to the preparation and review of this Use Agreement, promptly upon receipt of itemized bills, paid invoices, and other such documentation as Metricom shall reasonably require, and in a total amount not to exceed One Thousand Dollars (\$1,000). The reimbursement provided for in this § 4.5 shall not replace or excuse Metricom from the payment of any applicable permit fee for work undertaken pursuant to the initial installation of the Radios.

5. Relocation and Displacement of Radios. Metricom understands and acknowledges that City may require Metricom to relocate one or more of its Radios, and Metricom shall at City's direction relocate such Radios at Metricom's sole cost and expense, whenever City reasonably determines that the relocation is needed for any of the following purposes: (a) if required for the construction, completion, repair, relocation or maintenance of a City project; (b) because the Radio is interfering with or adversely affecting proper operation of City-owned light poles, traffic signals, or other Municipal Facilities; or (c) to protect or preserve the public health or safety. In any such case, City shall use its best efforts to afford Metricom a reasonably equivalent alternate location. If Metricom shall fail to relocate any Radios as requested by the City within a reasonable time under the circumstances in accordance with the foregoing provision, City shall be entitled to relocate the Radios at Metricom's sole cost and expense, without further notice to Metricom. To the extent the City has actual knowledge thereof, the City will attempt promptly to inform Metricom of the displacement or removal of any pole on which any Radio is located.

5.1 Relocations at Metricom's Request. In the event Metricom desires to relocate any Radios from one Municipal Facility to another, Metricom shall so advise City. City will use its best efforts to accommodate Metricom by making another reasonably equivalent Municipal Facility available for use in accordance with and subject to the terms and conditions of this Use Agreement.

5.2 Damage to Municipal Right-of-Way. Whenever the removal or relocation of Radios is required or permitted under this Agreement, and such removal or relocation shall cause the Municipal Right-of-Way to be damaged, Metricom, at its sole cost and expense, shall promptly repair and return the Municipal Right-of-Way. Metricom must notify the City immediately, regarding any damage to Municipal Facilities. City will undertake all repairs at Metricom's sole cost in which the Radios are located to a safe and satisfactory condition in accordance with applicable Laws, normal wear and tear excepted. If Metricom does not repair the site as just described, then the City shall have the option, upon fifteen (15) days' prior written notice to Metricom, to perform or cause to be performed such reasonable and necessary work on behalf of Metricom and to charge Metricom for the proposed costs to be incurred or the actual costs incurred by the City at City's standard rates. Upon the receipt of a demand for payment by the City, Metricom shall promptly reimburse the City for such costs.

5.3 City's Maintenance Right. The City's right to maintain and operate its Municipal Facilities in such a manner as will best enable the City to fulfill its own service requirements is in no manner limited by this Use Agreement.

## 6. Construction and Maintenance.

6.1 Conditions for Make-Ready. Metricom shall provide to City a copy of its construction design drawings and installation schedule for City's approval not less than three (3) weeks prior to Metricom's requirement for facilities installation on Municipal Facilities. However, after the review of the plans provided by Metricom, if the City determines that three (3) weeks is not a reasonable amount of time to perform the work on the plans provided by



Metricom, the City shall notify Metricom in writing of this and provide Metricom with an estimate of the amount of time requested to do the work on the plans provided by Metricom. Such approval shall not be unreasonably conditioned, withheld or delayed. Upon City's receipt of a request submitted by Metricom to place a Radio on the Municipal Facilities, the City shall perform the necessary make-ready work for Metricom's use of the Municipal Facilities. The City shall conduct a survey to determine the charges for necessary make-ready work, shall inform Metricom in writing of the estimated charges for such work and commence such work only after receiving the written approval and a deposit in the amount of the estimated costs. from Metricom. Metricom shall pay all direct and documented costs, including overhead and fringe benefits, reasonably incurred by the City in performing such make-ready work. Metricom shall make payment, if any, over the amount deposited, to the City within thirty (30) days from Metricom's receipt of City's itemized invoice therefor.

6.2 Notice to Proceed. After the completion of the make-ready work, the City's Commissioner of Public Works may, under reasonable terms and conditions established by him/her, authorize Metricom to place the Radios on Municipal Facilities.

by him/her, authorize Metricom to place the Radios on Municipal Facilities.

6.3 Construction Practices. Metricom shall, at its own expense, during the term of this Use Agreement, maintain its facilities covered by this Use Agreement in a safe condition, properly identified and tagged, in accordance with regulations established by the City and made available to Metricom in writing, so as not to physically conflict or electrically interfere with the Municipal Facilities.

6.4 Construction Management. Metricom shall notify the City ten (10) days in advance by written notice as provided in paragraph 11, before any routine repair or maintenance of its facilities. The City's agents shall have the authority, without subjecting the City to any liability therefor, to suspend Metricom's work or operations in and around the Municipal Facilities if, the reasonable business judgment of said employee or agent, any hazardous conditions arise or any unsafe practices, including unsafe practices which may threaten the integrity of the Municipal Facilities, are being followed by Metricom's employees, agents or contractors. In the event of a City imposed suspension of Metricom's work, authorized representatives of the City and Metricom shall promptly meet at the earliest possible moment but no more than twelve (12) hours after the imposition of the suspension, to take all steps necessary to continue. Within that time, the City shall provide to Metricom written notice of steps to be taken by Metricom to eliminate any hazardous conditions or to revise any practices deemed to be unsafe. The presence of the City's authorized agent shall not relieve Metricom of its responsibility to conduct all of its work in and around the Municipal Facilities in a safe and workmanlike manner.

6.5 Metricom shall provide the City with an updated map indicating all Municipal Facilities occupied by Metricom along with the payment of the Annual Fee.

## 7. Emergency Procedures.

7.1 City Emergency. In the event of a City emergency:

(a) City's work shall take precedence over any and all operations of Metricom on the Municipal Facilities.

(b) The City may rearrange Metricom's equipment and facilities. Metricom shall reimburse the City for all costs associated with such rearrangement.

7.2 Metricom Emergency. In the event of a Metricom emergency, Metricom shall immediately notify the City at its Department of Public Works at (414)286-3481 prior to performing any maintenance or repair necessary to correct the emergency situation.

## 8. Maintenance and Inspection Rights.

8.1 Maintenance upon Metricom Default. If any part of Metricom's facilities is not placed and maintained in accordance with the terms and conditions set forth in this Use Agreement and Metricom has not corrected the violation within thirty (30) days from receipt of written notice thereof from the City, then, in such event, the City may, at its option, correct said condition and notify Metricom in writing prior to performing such work. However, in the event such conditions pose an immediate threat to the safety of the City's employees or the public, interfere with the performance of the City's service obligations, or pose an immediate threat to the physical integrity of the Municipal Facilities, and prior notice to Metricom is not possible under the circumstances, the City may perform such work and/or take such action that it deems necessary without first giving written notice to Metricom and without subjecting itself to any liability for damage to Metricom's facilities or for any interruption of Metricom's services. As soon as practicable thereafter, the City will advise Metricom in writing of the work performed or the action taken. Metricom shall be responsible for all expenses incurred by the City associated with any work or action performed by the City pursuant hereto and shall reimburse the City within thirty (30) days from its receipt of the City's invoice therefor.

8.2 Inspection Rights. The City reserves the right to make periodic inspections of any part of Metricom's facilities located on Municipal Facilities. Metricom shall have the right to have its employees or representatives present during the time of any such inspection. The City shall give Metricom advance written notice of such inspections, except in those instances where, in the reasonable business judgment of the City, safety considerations justify the need for such an inspection without the delay of providing written notice. In that event, the City shall provide notice by any means available as immediately as possible thereafter. The making of periodic inspections or the failure to do so shall not operate to impose upon the City any liability of any kind whatsoever nor relieve Metricom of any responsibility, obligations or liability assumed under this Use Agreement.

9. Indemnification and Waiver. Metricom agrees to indemnify, defend, protect, and hold harmless the City, its council members, officers and employees from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgements, and all costs and expenses incurred in connection therewith, including reasonable attorney's fees and costs of defense (collectively, the "Losses") directly or proximately resulting from Metricom's activities undertaken pursuant to this Use Agreement,

except to the extent arising from or caused by the negligence or willful misconduct of the City, its council members, officers, employees, agents or contractors.

9.3 Notwithstanding the above, neither party shall be liable to the other for indirect or consequential damages of the other party, including, but not limited to, any interruption of service or for any loss of revenues resulting therefrom, whether caused by the negligence of either party or not.

10. Insurance. Metricom shall obtain and maintain at all times during the term of this Agreement Commercial General Liability insurance and Commercial Automobile Liability insurance protecting Metricom in an amount not less than Five Million Dollars (\$5,000,000) annual aggregate for each personal injury liability and products-completed operations. Such minimum limits may be met through an umbrella or excess coverage insurance policy. The Commercial General Liability insurance policy shall name the City, its council members, officers and employees as additional insureds as respects any covered liability arising out of Metricom's performance of work under this Use Agreement. Coverage shall be in an occurrence form and in accordance with the limits and provisions specified herein. Claims-made policies are not acceptable. Such insurance shall not be canceled, nor shall the occurrence or aggregate limits set forth above be reduced, until the City has received at least thirty (30) days' advance written notice of such cancellation or change. Metricom shall be responsible for notifying the City of such change or cancellation.

10.1 Filing of Certificates and Endorsements. Prior to the commencement of any work pursuant to this Use Agreement, Metricom shall file with the City the required original certificate(s) of insurance with endorsements, which shall state the following:

- (a) the policy number; name of insurance company; name and address of the agent or authorized representative; name and address of insured; project name; policy expiration date; and specific coverage amounts;
- (b) that the City shall receive thirty (30) days' prior notice of cancellation.
- (c) that Metricom's Commercial General Liability insurance policy is primary as respects any other valid or collectible insurance that the City may possess, including any self-insured retentions the City may have; and any other insurance the City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance; and
- (d) that Metricom's Commercial General Liability insurance policy waives any right of recovery the insurance company may have against the City.

The certificate(s) of insurance with endorsements and notices shall be mailed to the City at the address specified in § 8 below.

10.2 Workers' Compensation Insurance. Metricom shall obtain and maintain at all times during the term of this Use Agreement statutory workers' compensation and employer's liability

insurance in an amount not less than One Million Dollars (\$1,000,000) and shall furnish the City with a certificate showing proof of such coverage.

10.3 Insurer Criteria. Any insurance provider of Metricom shall be admitted and authorized to do business in the State of Wisconsin and shall carry a minimum rating assigned by A.M. Best & Company's Key Rating Guide of "A" Overall and a Financial Size Category of "X" (i.e., a size of \$500,000,000 to \$750,000,000 based on capital, surplus and conditional reserves). Insurance policies and certificates issued by non-admitted insurance companies are not acceptable.

10.4 Severability of Interest. Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved by the City. "Severability of interest" or "separation of insureds" clauses shall be made a part of the Commercial General Liability and Commercial Automobile Liability policies.

11. Notices. All notices which shall or may be given pursuant to this Use Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or email transmission, if a hard copy of the same is followed by delivery through the U.S. mail or by overnight delivery service as just described, addressed as follows:

if to the City:

City of Milwaukee  
Attn: Commissioner of Public Works  
841 N. Broadway, Room 516  
Milwaukee, WI 53202

Attn: City Clerk  
200 E. Wells Street, Room 205  
Milwaukee, WI 53202

Attn: City Attorney  
200 E. Wells Street, Room 800  
Milwaukee, WI 53202

if to Metricom:

Metricom, Inc.  
Attn: Network Real Estate

333 W. Julian Street  
San Jose, CA 95110

11.1 Date of Notices; Changing Notice Address. Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next business day in the case of facsimile, email or overnight delivery. Either party may from time to

time designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

14. Miscellaneous Provisions. The provisions which follow shall apply generally to the obligations of the parties under this Use Agreement.

14.1 Nonexclusive Use. Metricom understands that this Use Agreement does not provide Metricom with exclusive use of the Municipal Right-of-Way or any Municipal Facility and that City shall have the right to permit other providers of communications services to install equipment or devices in the Municipal Right-of-Way and on Municipal Facilities.

14.2 Waiver of Breach. The waiver by either party of any breach or violation of any provision of this Use Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Use Agreement.

14.3 Severability of Provisions. Both parties agree not to commence any litigation challenging the validity of this Agreement or any provision hereof and hereby affirmatively waives their right to do so. However, if any one or more of the provisions of this Agreement shall be held by court of competent jurisdiction in a final judicial action to be void, voidable or unenforceable, such provision(s) shall be deemed severable from the remaining provisions of this Agreement; and the parties shall promptly engage in negotiations for a replacement provision. If after 180 days from the date of the judicial declaration, the parties have not agreed to a replacement provision, either party may upon sixty (60) days notice to the other, terminate this Agreement.

14.4 Contacting Metricom. Metricom shall be available to the staff employees of any City department having jurisdiction over Metricom's activities twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the attachment, installation, operation, maintenance or removal of the Radios. The City may contact by telephone the network control center operator at telephone number (800) 873-3468 regarding such problems or complaints.

14.5 Governing Law; Jurisdiction. This Use Agreement shall be governed and construed by and in accordance with the laws of the State of Wisconsin, without reference to its conflicts of law principles. If suit is brought by a party to this Use Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of Wisconsin, County of [Name of County], or in the United States District Court for the [Federal District Court Name] District of Wisconsin.

14.6 Consent Criteria. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Use Agreement, such party shall not unreasonably delay, condition or withhold its approval or consent.

14.7 Representations and Warranties. Each of the parties to this Agreement represents and warrants that it has the full right, power, legal capacity and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding

upon such party without the requirement of the approval or consent of any other person or entity in connection herewith, except as provided in § 3.2 above.

14.8 Amendment of Use Agreement. This Use Agreement may not be amended except pursuant to a written instrument signed by both parties.

14.9 Entire Agreement. This Use Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements or understandings (whether oral or written) between or among the parties relating to the subject matter of this Use Agreement which are not fully expressed herein.

14.10 Liens and Encumbrances. Metricom has no power, authority or right to create and will not permit any lien or encumbrance, including, without limitation, tax liens, mechanics liens, or other liens or encumbrances with respect to work performed or equipment furnished, in connection with the installation, repair, maintenance or operation of its facilities within the Municipal Right-of-Way.

14.11 Limitation of Use. Metricom may not use the Municipal Right-of-Way or Municipal Facilities for the provision of “cable service” as that term is defined in federal, state or local law. The City’s grant of the rights under this Use Agreement is not intended nor should it be construed to be a grant of a cable franchise under federal or state law or under Chapter 99, Milwaukee Code of Ordinances.

In Witness Whereof, And in order to bind themselves legally to the terms and conditions of this Use Agreement, the duly authorized representatives of the parties have executed this Use Agreement as of the Effective Date.

CITY OF MILWAUKEE,  
a Wisconsin municipal corporation

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Clerk

COUNTERSIGNED:

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Comptroller

METRICOM, INC.,  
a Delaware corporation

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Approved as to content this  
\_\_\_\_ day of \_\_\_\_\_, 2001

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Special Deputy City Attorney

Approved as to form and execution  
this \_\_\_\_ day of \_\_\_\_\_, 2001

PBMcD:dms  
1/12/01  
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