

**CITY OF SAN DIEGO**  
**AMENDED AND RESTATED**  
**ATTACHMENT LICENSE AGREEMENT**

THIS AMENDED AND RESTATED ATTACHMENT LICENSE AGREEMENT (the “License”) is executed between THE CITY OF SAN DIEGO, a municipal corporation, hereinafter called “CITY” and METRICOM, INC., a Delaware corporation “Metricom.”

Recitals

- A. Under California law, the City has the right and power to regulate the time, location, and manner of attachment, installation, operation, and maintenance of personal wireless services on public property within the limits of the City.
- B. Metricom wishes to attach, install, operate and maintain a microcellular radio network on City facilities and facilities in the Public Right-of-Way for purposes of operating its Ricochet wireless digital communications radio network (“Network”).

**AGREEMENT**

NOW, THEREFORE, in consideration of and reliance upon the respective representations, promises, concessions, terms, and conditions contained herein, the parties agree as follows:

**SECTION 1: DEFINITIONS**

“Agency” shall mean any governmental agency or quasi-governmental agency other than the City, including the FCC and the CPUC.

“Annual Fees” shall mean payments to the City as specified in this Attachment License Agreement for use of each City-owned property for installation of a Radio.

“Attachment License Agreement” or “Agreement” shall mean this document.

“City” shall mean the City of San Diego, a municipal corporation in the State of California, and its agents, servants, officials, employees, agencies, affiliates and successors, and each of them.

“CPUC” shall mean the California Public Utilities Commission.

“Decorative Street Light Poles” shall mean any concrete, fiberglass, metal, or wooden pole that does not have a mast arm for electrolier support.

“FCC” shall mean the Federal Communications Commission.

“License” shall mean those terms under which Metricom is permitted to attach, install, operate, maintain, remove, reattach, relocate, and replace the Radios in the Public Right-of-Way as provided below.

“License Fees” shall mean payments to the City consisting of five percent (5%) of the Gross Revenues collected or received by Metricom in each calendar year or portion thereof, during the term of this License.

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

“Person” shall mean any natural person or any firm, joint partnership, association, joint venture, joint stock company, trust, corporation, or any other governmental or non-governmental, legally recognized entity.

“Provision” shall mean any agreement, clause, condition, covenant, qualification, restriction, reservation, term, or other stipulation in this License that defines, otherwise controls, establishes, or limits the performance required or permitted by either party to this License. All provisions, whether covenants or conditions, shall be deemed to be both covenants and conditions.

“Public Right-of-Way” shall mean in, upon, above, along, across, under, and over the public streets, roads, lanes, courts, ways, alleys, boulevards, and places, including, without limitation, all public utility easements and public service easements, as the same now or may thereafter exist that are under the jurisdiction of the City. This term shall not include any property owned by any person or Agency other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and such Person or Agency.

“Radio Month” shall mean a calendar month during which a Radio occupies space on a City-owned pole or other City-owned property, even if such occupancy is less than the entire month.

“Radios” shall mean that radio equipment to be installed and operated by Metricom hereunder.

“Ricochet” or “Ricochet ” shall mean Ricochet Microcellular Digital Network, a wireless digital communications microcellular radio network owned and operated by Metricom.

“Services” shall mean personal wireless digital communications services provided through Ricochet by Metricom.

“Total Gross Receipts” shall mean and include any and all income and other consideration collected, received, or in any manner gained or derived by Metricom

from, or in connection with, the provision of Ricochet subscription services, either directly by Metricom or indirectly through a reseller, to customers of such services with billing addresses in the City, including any imputed revenue derived from trades and barter equivalents to the full retail value of goods and services provided by Metricom. Total Gross Receipts shall not include (a) retail discounts or other promotions; (b) non-collectable amounts due Metricom or its customers; (c) refunds or rebates; (d) sales, ad valorem, or other types of “add-on” taxes, levies or fees calculated by gross receipts or gross revenues which might have to be paid or collected for federal, State, or local government (exclusive of the License Fees paid to the City provided for herein); and (e) non-operating revenues such as interest income or gain from sale of an asset.

## **SECTION 2: SCOPE OF LICENSE**

- 2.1 Rights Granted. Any and all rights expressly granted to Metricom under this License, 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 Public Right-of-Way only, exclusively or concurrently, with any other Person or Persons, and further shall be subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title which may affect the Public Right-of-Way. Nothing in this License shall be deemed to grant, convey, create, or vest a perpetual real property interest in land in Metricom, including any fee or leasehold interest, or easement.
  
- 2.2 Attachment to City Facilities. The City hereby authorizes and permits Metricom to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Radios in or on City street light poles, lighting fixtures, and electroliers, or other City-owned property within the Public Right-of-Way for the purposes of providing Services to Persons located within or without the limits of the City. Metricom agrees that it shall not attach its Radios to any Decorative or other non-standard street light poles, traffic signals or other non-approved City-owned fixtures within the Public Right-of-Way unless prior individual site approval is provided by the City. Any work performed pursuant to the rights granted under this License may, at the City's option, be subject to the prior review and approval of the City.
  
- 2.3 Attachment to Utility Facilities. Subject to obtaining the written permission of the owners of the affected property, the City hereby authorizes and permits Metricom to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace such number of Radios in or on poles or other structures owned by public utility companies or other property owners located within the Public Right-of-Way as may be permitted by the public utility company or property owner, as the case may be. Metricom shall furnish to the City documentation of said permission from the individual utility/property owner responsible.

- 2.4 Preference for City-Owned Property. In any situation where Metricom has a choice of attaching its Radios to either City-owned property or third-party-owned property in the Public Right-of-Way, Metricom agrees to attach to City-owned poles or other City-owned property, provided that such City-owned poles or other City-owned property are at least as suitable functionally for the operation of Metricom's Ricochet system as such third-party-owned poles or other property and the rental fee for such City-owned poles or other City-owned property is equal to or less than that for such third-party-owned poles or other property.
- 2.5 Interference. Except as permitted by applicable Laws or this License, in the performance and exercise of its rights and obligations under this License, Metricom 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 electric and telephone wires, electroliers, cable television, cellular, digital PCS, location monitoring services, and other telecommunications, utility, and municipal property without the express written approval of the owner or owners of the affected property or properties.
- 2.6 Compliance with Laws. Metricom shall comply with all applicable Laws in the exercise and performance of its rights and obligations under this License. If required by applicable Laws, Metricom shall obtain the approval for the Radios subject to this License, or any modifications or changes thereto, from any applicable governmental agencies, and secure any required assessment for impact that the Radios may have upon the environment.
- 2.7 Radio Size. If the size of the Radios change in any material way from that depicted in Exhibit 1 of this License, then Metricom shall notify the City, in writing, as soon as practicable. Such notice shall be served at least three (3) months prior to the effective date of any material change in the size of the Radios. City shall have the right to not unreasonably withhold approval of the placement of new Radio sizes proposed by Metricom.
- 2.8 City Facility Voltage. The City further reserves the right to modify the service voltage delivered to or at any street light pole or utility pole on which a Radio may be located. Metricom shall replace or modify any Radio that will be affected by such voltage modifications within fifteen (15) days of receiving notice of voltage modifications. In the event that Metricom fails to replace or modify any Radio within the fifteen day notice period before the voltage modification, the City may disconnect any such Radio until Metricom performs and completes the necessary work and advises the City accordingly.
- 2.9 Electricity Charges. Metricom agrees that it shall be solely responsible for the payment of all electrical utility charges and tariffs to the applicable utility company for any and all power consumption by Radios and other Metricom equipment residing on City facilities. Metricom agrees that any Radio attachments or

equipment occupation on City facilities is subject to the prior mutual agreement between Metricom and the applicable utility company for any and all power consumption by Radios and other Metricom equipment residing on City facilities.

### **SECTION 3: TERM**

- 3.1 Term of License. The term of this License shall be for a term ending June 4, 2002 unless it is earlier terminated by the City in accordance with the provisions herein. This License may be renewed by the City for two (2) successive terms of three (3) years each, on the same terms and conditions as set forth herein, unless Metricom notifies the City of its intention not to renew not less than one-hundred twenty (120) days prior to commencement of the relevant renewal term.
- 3.2 Holdover. Any holdover by Metricom, after expiration or termination, shall not be considered as a renewal or extension of this License. The occupancy of the premises, after the expiration or termination of this agreement, constitutes a month-to-month tenancy, and all other terms and conditions of this agreement shall continue in full force and effect.

### **SECTION 4: PAYMENTS TO CITY**

- 4.1 License Fee. Metricom agrees to pay to the City, on a quarterly basis, in lawful money of the United States, five percent (5%) of Metricom's Total Gross Receipts received by Metricom from the sale of Ricochet service subscriptions to customers with billing addresses in the City. License Fee payments pursuant to this Section shall not include City administration fees such as inspection fees, business taxes, permit fees, the Annual Fee pursuant to this Agreement, or other regulatory charges.

Payment shall be due on or before the 30<sup>th</sup> day after each calendar quarter ending on March 31, June 30, September 30 and December 31 in each year during the term of this License, and forty-five (45) days after the expiration of the term of this License. Checks should be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 2289, San Diego, California 92112-4165, or delivered to the Office of the City Treasurer, City Operations Building, 1222 First Avenue, Third Floor, San Diego, California. The place and time of payment may be changed at any time by City upon thirty (30) days' written notice to Metricom. Mailed rental payments shall be deemed paid upon the date such payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed paid upon actual receipt by the City Treasurer. Metricom assumes all risk of loss and responsibility for late payment charges if payments are made by mail.

- 4.2 Financial Statement. Metricom shall file a statement with each payment, verified by Metricom or a duly authorized representative of Metricom, showing in such form and detail as the City Manager may reasonably require from time to time the

facts material to a determination of the amount due for the previous calendar quarter.

- 4.3 Payment corrections. If the City or Metricom discovers that Metricom has failed to pay the entire or correct amount of compensation due, the City shall be paid by Metricom within fifteen (15) days of discovery of the error or determination of the correct amount. Any overpayment to the City through error or otherwise, shall be offset against the next payment due from Metricom under this License. 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 License 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.
- 4.4 Delinquent License Fee. If Metricom fails to pay the License Fee within thirty (30) days from the due date, Metricom will pay, in addition to the unpaid fees, a sum of money equal to one percent (1%) of the amount due for each month or fraction thereof during which the payment is due and unpaid, as interest and for loss of use of the money due.
- 4.5 Additional Remedies. The sections in subparagraph (d) of this section are not exclusive, and do not preclude the City Manager or designee from pursuing any other or additional remedy in the event that payments become overdue by more than sixty (60) days.

## **SECTION 5: ADDITIONAL COMPENSATION**

- 5.1 Annual Fee. As additional compensation under this License, Metricom shall pay to the City an annual fee (the "Annual Fee") in the amount of Sixty (60) dollars for the use of each City-owned pole or other approved City-owned structure or piece of property upon which a Radio has been installed pursuant to this License.
- 5.2 Remittance. The initial Annual Fee shall be due and payable not later than the date of installation of the first Radio on City-owned poles or other City-owned property under this License (the "Installation Date") and shall be computed based upon the number of Radios Metricom estimates as of the Installation Date that it will install on City-owned poles or other City-owned property during the succeeding twelve (12) months. The Annual Fee for subsequent years shall be due and payable not later than thirty (30) days following each anniversary of the Installation Date and shall equal the total number of Radios then installed on City-owned poles or other City-owned property pursuant to this License multiplied by the Annual Fee, adjusted for the Prior Year Adjustment, as described immediately below. The Prior Year Adjustment shall either increase or decrease a subsequent year's aggregate Annual Fee to account for the installation or removal of Radios during the prior year, and shall equal the difference between (1) the total number of Radios used to calculate the prior year's aggregate Annual Fee multiplied by twelve (12) and (2) the actual number of Radio Months which occurred during such year, multiplied by

one-twelfth of the Annual Fee.

- 5.3 Fee Adjustments. At the commencement of each renewal term, the Annual Fee shall be increased effective January 1<sup>st</sup> of the first year of each renewal term by a percentage change in the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index of all items, for "All Urban Consumers" for Los Angeles/Anaheim/Riverside, California. If this index is no longer published, the index for adjustment will be the U.S. Department of Labor's "Comprehensive Official Index" most comparable to the aforesaid index. If a rental adjustment is calculated using an index from a different base year than 1982-84, which equaled a base figure of 100 for the CPI, the base figure used will first be converted under a formula supplied by the Bureau of Labor Statistics or its successor.

If the Department of Labor indices are no longer published, another index generally recognized as authoritative will be substituted by agreement of City and Metricom. If the parties cannot agree within sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the Regional Office of the Bureau of Labor Statistics or its successor, notwithstanding continued reference herein to "CPI" in any event.

Regardless of the index publication dates, the effective date of the License Fee adjustment is as specified in this Subsection b.(1), CPI Index Adjustments. Until the License Fee adjustment can be reasonably determined by the index method, Metricom shall continue to make payments at the existing rental rate. When the adjustment is determined, the balance of rents due at the adjusted rate will be paid to City within thirty (30) days. In no event shall the adjusted License Fee, as established by the Consumer Price Index, be less than the License Fee in existence immediately prior to the adjustment date.

- 5.4 Services Provided to City. The following services are to be provided to the City under the terms specified in addition to the compensation provided to the City under this Section:
- (A) up to seventy-five (75) no cost subscriptions to use Metricom's Ricochet Services, or other services including, but not limited to, Internet services, Electronic Mail, and other Wireless data transfer services and the use of up to fifteen (15) Ricochet modems at no cost, for so long as Metricom maintains Radios in use on the appropriate number of City-owned poles or other City-owned property pursuant to this License. Metricom shall provide such subscriptions and equipment at such time as Metricom is providing commercial service in the City. Additional subscriptions, modems, and/or services are to be provided to the City at a cost not to exceed the lowest standard service price to corporate or residential subscribers. City's use of the modems and subscriptions shall be subject to the standard terms and conditions set forth in the terms and conditions packaged with the modems. City shall be required to return to Metricom any equipment provided to City

upon termination of any free subscriptions in good condition, ordinary wear and tear excepted.

(B) nothing shall prohibit the City and Metricom from agreeing to substitute other technologies or Services provided by Metricom in lieu of Subsection A above.

5.5 City Use. City shall use all subscriptions and equipment provided pursuant to this License solely for its own use and shall not be entitled to resell, distribute, or otherwise License the use of the same by any other party.

5.6 Utility User's Tax/Possessory Interest Tax. Metricom acknowledges and agrees that the City may require users of revenue-producing services such as the Services to pay a utility users' tax ("Utility Tax") to the City pursuant to City's Municipal Code. If the City establishes a Utility Tax and determines that the Services are subject to the Utility Tax, Metricom agrees to collect the tax from Service users and remit such tax to the City in accordance with City's Municipal Code. Metricom recognizes and agrees that this License may create a possessory interest subject to property taxation, and that Metricom may be subject to the payment of taxes levied on such interest, and that Metricom shall pay all such possessory interest taxes. Metricom further agrees that payment for such taxes, fees and assessments will not reduce any license fee due City.

5.7 Audit and Inspection of Records. Upon reasonable prior notice, during normal business hours, and as reasonably often as the City deems necessary, Metricom shall make available to the City for examination at reasonable locations within the City of San Diego, all of Metricom's data and records with respect to all matters covered by this License, and Metricom will allow the City to audit, examine, and make excerpts of transcripts from such data and records, and to make audits of all invoices, materials, and payrolls, records of personnel, and other data relating to all matters covered by this License. Metricom shall maintain such data and records in an accessible location and condition for a period of not less than three years following receipt of final payment under this License, unless the City agrees in writing to an earlier disposition.

## **SECTION 6: CONSTRUCTION**

6.1 Construction Specifications. Metricom shall meet all federal, State, City and trade organization technical specifications and requirements, including, but not limited to Caltrans Standard Plans and Standard Specifications, and all State and local codes, related to the operation and placement of Metricom devices on City facilities. Metricom shall not attach, install or operate any Radio in or on City street light poles, lighting fixtures, and electroliers, or other City-owned property without the prior written approval of the City for each location. Metricom agrees that it will establish a mutually acceptable process with the City for the advanced approval of Radio device placement on City facilities.



- 6.2 Construction Permits. In the event that the attachment, installation, operation, or maintenance of Radios shall require any construction work in the Public Right-of-Way, Metricom shall apply for the appropriate street opening and other permits required by law.
- 6.3 Non-Exclusivity of Pole Attachment. This license is for the non-exclusive use of City property. City reserves the right to allow the lease, sale or rental of additional pole space, including City poles occupied by Metricom, to other entities at the sole discretion of the City, provided that the City shall not permit the use of additional space on City-owned poles or other City-owned property after the Effective Date of this License if such occupancy would cause interference with the Ricochet network. Metricom will have the burden-of-proof in providing evidence to the City of actual interference with the Ricochet network. The City will maintain the sole authority to make the determination on the reasonableness of the interference claim. The City, at its option, may rely on the findings of City staff and/or an independent analysis of the interference claim.
- 6.4 Radio Relocation. Metricom understands and acknowledges that City may require Metricom to relocate, and Metricom shall, at City's direction, relocate upon fifteen (15) days' prior written notice at Metricom's sole cost and expense, a Radio whenever the City reasonably determines that the relocation is needed: (a) to facilitate or accommodate 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 light poles, traffic signals or other City facilities, or (c) to protect or preserve the public health, safety, or welfare. If Metricom shall fail to relocate any Radios as requested by the City in accordance with the foregoing sentence, City shall be entitled to relocate the Radios at Metricom's sole cost and expense.
- 6.5 All-Hours Contact. 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.
- 6.6 Removal of Radios. Whenever the removal or relocation of Radios is required under this License, and such removal or relocation shall cause the Public Right-of-Way to be damaged, Metricom, at its sole cost and expense, shall promptly repair and return the Public Right-of-Way, 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 to perform or cause to be performed such reasonable and necessary work on behalf of Metricom, and charge Metricom the actual costs incurred by the City. Upon the receipt of a demand for payment by the City, Metricom shall reimburse the City for such costs.

- 6.7 Restoration and Repair. Upon the completion of each installation or removal of equipment by Grantee under this License and upon the expiration or earlier termination of this License, Grantee shall promptly restore all areas affected by such installation or removal to a clean and safe condition, normal wear and tear excepted, and to new construction standards. The provisions of this section shall survive the expiration, completion, or earlier termination of this License. Metricom agrees that preliminary steps toward performing repairs, restoration, or replacement of the City facilities shall be commenced by Metricom within thirty (30) days, and the required repairs, restoration, or replacement shall be completed within a reasonable time thereafter.
- 6.8 Review of Facilities. Metricom agrees that, pursuant to the License renewal under Subsection 3.1 herein, a review of Licensee Radios will be conducted jointly between the City and Metricom. The purpose of the review of facilities will be to assess technological improvements that will enable a reduction in the visual impacts of Radios.

## **SECTION 7: ASSIGNMENT**

- 7.1 Time is of Essence. Time is of the essence of all of the terms, covenants, and conditions of this License, and, except as otherwise provided herein, all of the terms, covenants, and conditions of this License shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.
- 7.2 Assignment and Subletting. Metricom shall not assign this License or any interest therein and shall not sublet the premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person, except employees, agents, and guests of Metricom, to use or occupy the premises or any part thereof, without the prior written consent of the City Manager or designee in each instance, which shall not be unreasonably withheld, conditioned, or delayed. Notwithstanding the foregoing, the transfer of the rights and obligations of Metricom hereunder to a parent, subsidiary, or financially viable affiliate of Metricom or to any successor-in-interest or entity acquiring all or substantially all of Metricom's outstanding voting stock or assets shall not be deemed an assignment or transfer for the purposes of this Permit, provided that (i) any such transferee will have a financial strength after the proposed transfer at least equal to that of Metricom prior to the transfer, (ii) any such transferee assumes all the obligations of Metricom hereunder, and (iii) Metricom shall not be released from the obligations of this Permit by virtue of such transfer. If such criteria are satisfied, it shall not be deemed reasonable for the City to withhold its consent to the proposed transfer, unless the proposed transferee has a record of performance under similar agreements which is unacceptable to the City under a reasonable standard of evaluation. Lack of prior specific experience in administering a system providing the Services described in this Permit shall not, by itself, be deemed a reasonable basis for refusing or conditioning the City's consent. Metricom shall give to the City thirty (30) days' prior written notice of any proposed transfer for which notice is required hereunder, and the City's consent shall be deemed

approved unless the City objects in writing within such thirty-day period. In the case of any proposed transfer for which the City's consent is required hereunder, Metricom agrees to reimburse the City for its reasonable expenses incurred in reviewing such transfer proposal.

7.3 Defaults. In the event that:

- (A) Metricom shall default in the performance of any covenant or condition required by this License to be performed by Metricom and shall fail to cure said default within thirty (30) days following written notice thereof from City; or if any such default is not curable within thirty (30) days, and Metricom shall fail to commence to cure the default(s) within said thirty-day period and diligently pursue such cure to completion; or
- (B) Metricom shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law; or
- (C) Metricom shall be adjudicated a bankrupt; or
- (D) Metricom shall make a general assignment for the benefit of creditors;

then City may, at its option, without further notice or demand upon Metricom or upon any person claiming rights through Metricom, immediately terminate this License and all rights of Metricom and of all persons claiming rights through Metricom to the premises or to possession thereof; and City may remove, or cause to be removed, all of Metricom's facilities. Provided, however, in the event that any default described above is not curable within thirty (30) days after notice to Metricom, City shall not terminate this License pursuant to the default if Metricom immediately commences to cure the default and diligently pursues such cure to completion.

In the event there is a deed of trust or mortgage on the leasehold interest, City shall give the mortgagee or beneficiary written notice of the default(s) complained of, and the same mortgagee or beneficiary shall have thirty (30) days from such notice to cure the default(s) or, if any such default is not curable within thirty (30) days, to commence to cure the default(s) and diligently pursue such cure to completion. The thirty-day period may be extended during such time as mortgagee or beneficiary pursues said cure with reasonable diligence.

7.4 Remedies of Lender. Should the default(s) be noncurable by Metricom, then any lender holding a beneficial interest in the leasehold, whose qualifications as an assignee have been approved by City, shall have the absolute right to substitute itself to the estate of Metricom hereunder and to commence performance of this License. If such mortgagee or beneficiary shall give notice in writing of its election to substitute itself within the thirty-day period after receiving written notice by City of the default, and the default, if curable, is cured by such mortgagee or beneficiary,

then this License shall not terminate pursuant to the default. In that event, City expressly consents to the substitution and authorizes the mortgagee or beneficiary to perform under this License with all the rights, privileges, and obligations of Metricom, subject to cure of the default, if possible, by mortgagee or beneficiary. Metricom expressly agrees to assign all its interest in and to its leasehold estate to mortgagee or beneficiary in that event.

- 7.5 Abandonment. In addition to any other provision of this License, if Metricom has abandoned the property, Metricom shall pay to the City a severance fee equal to forfeiture of the amount of the Annual Fee which Metricom has prepaid to the City for the period up to and including the next anniversary of the Effective Date after the actual date of termination and/or abandonment. In addition, Metricom shall pay to the City all reasonable costs incurred in connection with any such action. Such payment shall relieve both parties of any further obligations under this License, although each shall continue to have its remedies for any breach of an obligation which occurred prior to the date of termination and/or abandonment.
- 7.6 Waiver. Any City waiver of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the City Manager or designee in order to constitute a valid and binding waiver. City delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this License. The use of one remedy or right for any default does not waive the use of another remedy or right for the same default or for another or later default. City's acceptance of any rents is not a waiver of any default preceding the License Fee payment. City and Metricom specifically agree that the property constituting the premises is City-Licensed and held in trust for the benefit of the citizens of the City of San Diego and that any failure by the City Manager or City staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but City shall at all times, have the legal right to require the cure of any default when and as such defaults are discovered by the City.

## **SECTION 8: INDEMNIFICATION**

- 8.1 Hold Harmless: Metricom agrees to defend, indemnify, protect, and hold the City, its agents, officers, and employees harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to Metricom's employees, invitees, guests, agents, or officers, which arise out of or are in any manner directly or indirectly connected with the development or operation of the Licensehold or the work and operations to be performed under this License, and all expenses of investigating and defending against same; provided, however, that Metricom's duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole-willful misconduct of the City, its agents, officers, or employees.

## **SECTION 9: INSURANCE**

- 9.1 Insurance required. Upon the effective date of this License, Metricom shall include its obligations under this License in its program of liability insurance, covering Metricom's occupancy and use thereof. Evidence of such program of insurance shall be evidenced by a "Statement of Coverage" issued by Metricom to City. Insurance limits must be, at a minimum, the limits in Paragraph (A and B) below.
- (A) Public liability and property damage insurance in the amount of not less than One Million Dollars (\$1,000,000), per occurrence, subject to a combined single limit of Five Million Dollars (\$5,000,000) (combined single limit liability with an occurrence claims form). This policy shall cover all injury or damage, including death, suffered by any party or parties from acts or failures to act by City or Metricom or by authorized representatives of City or Metricom on or in connection with the use or operation of the premises
- (B) Fire, extended coverage, and vandalism insurance policy on all insurable property on the premises in an amount to cover 100 percent of the replacement cost. Any proceeds from a loss shall be payable jointly to City and Metricom. The proceeds shall be placed in a trust fund to be reinvested in rebuilding or repairing the damaged property.
- 9.2 Additional Insured. All insurance policies will name City as an additional insured, protect City against any legal costs in defending claims, and will not terminate without thirty (30) days' prior written notice to City. All insurance companies must be satisfactory to City and licensed to do business in California. All policies will be in effect on or before the first day of the License, except "course of construction fire insurance" which shall be in force on commencement of all authorized construction on the premises, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. A copy of the insurance policy will remain on file with City during the entire term of the License. At least thirty (30) days prior to the expiration of each policy, Metricom shall furnish a certificate(s) showing that a new or extended policy has been obtained, which meets the terms of this License
- 9.4 Accident Reports. Metricom shall report to City any accident causing more than Five Hundred Dollars (\$500.00) worth of property damage or any serious injury to persons on the premises. This report shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses of any witnesses, and other pertinent information.
- 9.5 Failure to Comply. If Metricom fails or refuses to take out and maintain the required insurance or fails to provide the proof of coverage, City has the right to obtain the insurance. Metricom shall reimburse City for the premiums paid with interest at the maximum allowable legal rate then in effect in California. City shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid, names of the insurer(s), and rate of interest. Said reimbursement and interest shall be

paid by Metricom on the first (1st) day of the month following the notice of payment by City.

Notwithstanding the preceding provisions of this Subsection, if Metricom fails or refuses to take out or maintain insurance as required in this License or fails to provide the proof of insurance, City has the right to declare this License in default without further notice to Metricom, and City shall be entitled to exercise all legal remedies in the event of such default.

## **SECTION 10: FILING AND COMMUNICATION WITH REGULATORY AGENCIES**

- 10.1 Copies provided to City. A descriptive listing of all relevant petitions, applications and communications of all types submitted by Metricom or the City to the Federal Communications Commission, Securities and Exchange Commission, California Public Utilities Commission, or any other Federal or State regulatory commission or agency having jurisdiction over any matter affecting the operation of Metricom's network, shall be submitted every three (3) months commencing with the effective date of this License. The City and Metricom shall have the right to request and receive complete copies of any such petitions, applications and communications; provided, however, that complete copies of any information required to be filed with the Federal Communications Commission in regards to technical performance requirements and standards shall be submitted simultaneously to the City. A copy of each document filed by Metricom with the City Clerk, in accordance with this section, shall be delivered to the City Manager and City Attorney.

## **SECTION 11: GENERAL PROVISIONS**

- 11.1 Notices: Any notice, required to be given hereunder shall be in writing, and may be served personally or by United States mail, postage prepaid, addressed to Metricom at:

**Metricom, Inc.**  
Attn: Network Real Estate Department  
333 West Julian Street  
San Jose, CA 95110

or at such other address designated in writing by Metricom; and to City as follows:

Department of Information Technology  
City of San Diego  
1200 Third Avenue, Suite 250  
San Diego, CA 92101

Or to any mortgagee, trustee, or beneficiary, as applicable, at such appropriate address designated in writing by the respective party.

Any party entitled or required to receive notice under this License may by like notice, designate a different address to which notices shall be sent.

- 11.2 Compliance with Law. Metricom shall at all times in the construction, maintenance, occupancy, and operation of the premises, comply with all applicable laws, statutes, ordinances, and regulations of City, county, state, and federal governments at Metricom's sole cost and expense. In addition, Metricom shall comply with any and all notices issued by the City Manager or his authorized representative under the authority of any such law, statute, ordinance, or regulation.
- 11.3 City approval. The approval or consent of City, wherever required in this License, shall mean the written approval or consent of the City Manager or designee unless otherwise specified, which approval or consent shall not be unreasonably withheld, conditioned, or delayed.
- 11.4 Nondiscrimination. Metricom agrees not to discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in Metricom's enjoyment of its rights and performance of its obligations under this License, and the obtaining and holding of employment in connection therewith.
- 11.5 Compliance with City Equal Opportunity Contracting Program.

- (A) Equal Opportunity Contracting. Metricom acknowledges and agrees that it is aware of, and will comply with, City Manager or designee Ordinance No. 18173 (San Diego Municipal Code Sections 22.2701 through 22.2708, as amended), EQUAL EMPLOYMENT OPPORTUNITY OUTREACH PROGRAM, a copy of which is on file in the Office of the City Clerk and by this reference is incorporated herein. Metricom and all of its subcontractors are individually responsible to abide by its contents.

Metricom will comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. Metricom will not discriminate against any employee or applicant for employment on any basis prohibited by law.

Metricom submitted and City acknowledges receipt of a current Work Force Report or a current Equal Employment Opportunity (EEO) Plan as required by Section 22.2705 of the San Diego Municipal Code, which sets forth the actions that Metricom will take to achieve the City's commitment to equal employment opportunities.

Metricom agrees to insert the foregoing provisions in all subcontracts for any work covered by this License agreement so that such provisions will be binding upon each subcontractor. Metricom agrees that compliance with EEO provisions

flowing from the authority of both parties will be implemented, monitored, and reviewed by the City's Equal Opportunity Contracting Program staff.

- (B) Local Business and Employment. Metricom acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms in all City contracts. Metricom will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this License agreement from local residents and firms as opportunities occur. Metricom agrees to hire qualified local residents and firms whenever feasible.

Metricom understands that failure to comply with the above requirements and/or submitting false information in response to these requirements may result in termination of this License agreement and debarment from participating in City contracts for a period of not less than one (1) year.

- 11.6 Partial Invalidity. If any term, covenant, condition, or provision of this License is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions will remain in full force and effect.
- 11.7 Legal Fees. In the event of any litigation regarding this License, the prevailing party shall be entitled to an award of reasonable legal costs, including court and attorneys' fees.
- 11.8 Number and Gender. Words of any gender used in this License shall include any other gender, and words in the singular number shall include the plural, when the context requires.
- 11.9 Captions. The License Outline, section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this License. The numbers of the paragraphs and pages of this License, if not consecutive, are intentional and shall have no effect on the enforceability of this License.
- 11.10 Entire Understanding. This License contains the entire understanding of the parties. Metricom and City, by signing this agreement, agree that there is no other written or oral understanding between the parties with respect to the matters covered in this License. Each party has relied on its own examination of the poles and property which are the subject of this License, advice from its own attorneys, and the warranties, representations, and covenants of the License itself. Each of the parties in this License agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty, whatsoever, which is not contained in this License.

The failure or refusal of any party to read the License or other documents, inspect the poles and property which are the subject of this License, and obtain legal or other



advice relevant to this transaction, constitutes a waiver of any objection, contention, or claim that might have been based on these actions. No modification, amendment, or alteration of this License will be valid unless it is in writing and signed by all parties.

11.11 Drug-free Workplace. Metricom shall be required to abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by doing all of the following:

- (A) Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of controlled substances are prohibited on the License hold and specifying the actions that will be taken against employees for violations of the prohibition.
- (B) Establishing a drug-free awareness program to inform employees about all of the following:
  - (1) The dangers of drug abuse in the workplace.
  - (2) The Metricom's policy of maintaining a drug-free workplace.
  - (3) Any available drug counseling, rehabilitation, and employees assistance programs.
  - (4) The penalties that may be imposed upon employees for drug abuse violations.

11.12 Disabled Access Compliance. Metricom agrees to comply with applicable regulations within the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulations hereafter enacted protecting the rights of people with disabilities. Metricom's compliance shall include, but not necessarily be limited to, the following:

- (A) Metricom shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
- (B) No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs, or activities of Metricom.
- (C) Metricom shall post a statement addressing the requirements of the ADA in a prominent place at the work site.

- (D) Where required by law, Metricom shall comply with City's disabled access requirements by bringing up to code and making accessible any areas of the premises which deny access to disabled persons. All such improvements and alterations shall be at the sole cost of Metricom.

Metricom understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a default under this License.

11.13 Corporate Authority. Each individual executing this License on behalf of Metricom represents and warrants that he/she is duly authorized to execute and deliver this License on behalf of said corporation, in accordance with a duly adopted resolution of the Board of Directors of the corporation or in accordance with the bylaws of the corporation, and that this License is binding upon the corporation in accordance with its terms, and that Metricom is a duly qualified corporation and all steps have been taken prior to the date hereof to qualify Metricom to do business in the state where the premises are situated.

((remainder of page intentionally left blank))

**SECTION 12: SIGNATURES**

IN WITNESS WHEREOF, this License Agreement is executed by the City of San Diego, acting by and through its City Manager, and by Metricom, acting by and through its lawfully authorized officers.

**THE CITY OF SAN DIEGO**

By \_\_\_\_\_  
Its \_\_\_\_\_

Date \_\_\_\_\_, 1999

I HEREBY CERTIFY I can legally bind METRICOM, and that I have read all of this Agreement, this \_\_\_\_ day of \_\_\_\_\_, 2000.

**METRICOM**

By \_\_\_\_\_  
Authorized Representative

I HEREBY APPROVE the form and legality of the foregoing Agreement this \_\_ day of \_\_\_\_\_, 1999.

CASEY GWINN, City Attorney

By \_\_\_\_\_  
Deputy City Attorney

MSJ  
3/