

St. Louis City Ordinance 65196

FLOOR SUBSTITUTE
BOARD BILL NO. 301 [00]

INTRODUCED BY ALDERMAN TERRY KENNEDY

An ordinance authorizing and directing the Comptroller and Communications Commissioner to enter into and execute, on behalf of the City, a Right-of-Way Use Agreement ("Agreement") between The City of St. Louis ("the City") and Metricom, Inc., ("Metricom") pursuant to which Metricom, for the purposes of operating Ricochet[®], a wireless digital communications microcellular network, will locate, place, attach, install, operate and maintain radio equipment within the City's right-of-way on terms and conditions set forth in the Agreement, attached hereto, marked Exhibit 1 and incorporated herein by reference.

BE IT ORDAINED BY THE CITY OF ST. LOUIS, AS FOLLOWS:

SECTION ONE. The Comptroller and Communications Commissioner are hereby authorized and directed to enter into and execute an Agreement between the City and the Metricom in substantially the form attached hereto as Exhibit 1, which is incorporated herein and made a part of this ordinance by this reference.

EXHIBIT 1

Right-of-Way Use Agreement

THIS RIGHT-OF-WAY USE AGREEMENT ("Use Agreement") is dated as of _____, 2000 (the "Effective Date"), and entered into by and between the CITY OF SAINT LOUIS, a Missouri municipal corporation (the "City"), and METRICOM, INC., a Delaware corporation ("Metricom").

Recitals

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 and related equipment certified by the Federal Communications Commission.

For purposes of operating Ricochet[®], Metricom wishes to locate, place, attach, install, operate, and maintain Radios in the Public Right-of-Way on facilities owned by the City, as well as on facilities owned by third parties therein.

Agreement

Now, therefore, for 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 to the provisions of this Use Agreement.

1.1. **Abandoned.** "Abandoned" refers to any Radio installed on a Municipal Facility that has been left by Metricom in an unused or non-functioning condition for more than one hundred and twenty (120) consecutive days, unless Metricom establishes to the reasonable satisfaction of the City that the Radios have continued viability at their locations.

1.2 **Adjusted Gross Revenues.** "Adjusted Gross Revenues" means all revenue received by Metricom with respect to and/or deriving from the provision of Services, whether directly by Metricom or through any other Person, to customers with billing addresses in the City. "Adjusted Gross Revenues" shall not include (i) the Right-of-Way Fee, if any, payable pursuant to ⁶ below and any utility users' tax, communications tax, or similar tax or fee; (ii) local, state, or federal taxes collected by Metricom that have been billed to the subscribers and separately stated on subscribers' bills; or (iii) revenue uncollectible from subscribers (i.e., bad debts) with billing addresses in the City that was previously included in Adjusted Gross Revenues.

1.3. **City.** "City" means the City of St. Louis, Missouri, as represented by the City Engineer.

1.4. **City Engineer.** "City Engineer" means the President of the Board of Public Service, or such other person designated to administer and enforce this Use Agreement by City.

1.5. **Effective Date.** "Effective Date" means the date of this Use Agreement stated above.

1.6. **Installation Date.** "Installation Date" shall mean the date that the first Radio is installed by Metricom pursuant to this Use Agreement.

1.7 **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 City, Metricom, or Metricom's agents providing its Ricochet service, as may be in effect either as of the Effective Date or at any time during the presence of Radios in the Public Right-of-Way.

1.8 **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.




1.9. **Municipal Facilities.** "Municipal Facilities" means any electroliers or other structures located within the Public Right-of-Way and solely owned by the City, with the exception of street lights..

1.10. **Person.** "Person" means an individual, a corporation, a limited liability company, a

general or limited partnership, a sole proprietorship, a joint venture, a business trust, or any other form of business association.

1. 11. **Public Right-of-Way.** "Public Right-of-Way" means any street, alley, road, highway, lane or right-of-way located within the City and dedicated or commonly used now or hereafter for utility purposes, including utility easements wherein the City now or hereafter acquires the right and authority to locate or permit the location of utilities consistent with telecommunications facilities. This term shall not include any Municipal Facilities, nor shall it include county, state, or federal rights-of-way or any property owned by any Person or agency other than the City, except as provided by applicable Laws or pursuant to a maintenance, jurisdictional or other agreement between the City and any such Person or agency. "Public Right-of-Way" shall not include property owned or leased by the City other than right-of-way, such as City parks, City Hall property or public works facilities.

1.12. **Radio.** "Radio" means the radio equipment, whether referred to singly or collectively to be installed on the Public Right-of-Way and operated by Metricom as provided herein and as described in the attached Exhibit A. No other equipment or facilities shall be deemed included in the term "Radio."

1.13. **Ricochet** . "Ricochet  means Ricochet  MicroCellular Data Network, a wireless digital communications microcellular network owned and operated by Metricom.

1.14. **Services.** "Services" means the mobile digital communications access and support provided through Ricochet by Metricom for the purpose of providing subscribers access to wireless Internet, private intranet, e-mail, and local area networks. "Services" do not include cable, open video services, or telecommunications services subject to the 1996 Federal Telecommunications Act.

2. SCOPE OF AGREEMENT.

2.1 **Term.** This Agreement shall extend for an initial term of five (5) years commencing on the Installation Date, unless it is earlier terminated by either party in accordance with the provisions herein, and two successive renewal periods of two (2) years each on the same terms and conditions, unless either party notifies the other of its intention not to renew not less than thirty (30) calendar days prior to commencement of the relevant renewal term. However, if at any point Metricom (i) expands its services beyond the authorized Services, excluding short-term product awareness and promotional campaigns, or similar changes ("New Service") and (ii) derives meaningful or substantial revenue therefrom, it must notify the City of such plans prior to the implementation of the New Service and negotiate in good faith with the City any necessary amendments to this Agreement to avoid interruption of the Services. This Agreement to negotiate in good faith on the part of the City does not constitute a promise or guarantee that an agreement for New Service will be reached. If the City rejects the New Service, then Metricom's use shall continue in accordance with the terms of this Agreement. Upon expiration or termination of this Use Agreement, Metricom shall

promptly, but in no event longer than ninety (90) days, remove the Radios from the Public Right-of-Way at Metricom's sole expense. If Metricom fails to remove all Radios within such period, the City may remove the Radios at Metricom's sole cost and expense, without further notice to Metricom. Metricom will, within thirty (30) days following receipt of an invoice by the City, reimburse the City for its expenses incurred in the removal of the Radios.

2.2 Default. Neither party shall be in default under this Use Agreement or in breach of any provision hereof unless and until the other party shall have given written notice of default and the defaulting party shall have failed to cure the default within thirty (30) days after receipt of such notice; provided, however, that where such default cannot reasonably be cured within such thirty (30) day period, if the defaulting party shall proceed promptly to cure the same, and prosecute such cure with due diligence, the time for curing such default shall be extended for such period of time as may be necessary under the circumstances to complete such cure. Notwithstanding the provisions regarding the opportunity to cure defaults, the City may also terminate this Use Agreement at any time if (a) Metricom becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt; or (b) Metricom attempts to or does practice any fraud or deceit in its conduct or relations with the City under this Use Agreement. Nothing herein shall preclude the City from acting immediately without notice in case of emergency or as otherwise may be provided in this Use Agreement.

2.3 Extension. Unless sooner terminated, prior to the end of the last renewal period set forth in Section 2.1, Metricom and the City shall enter into good faith negotiations to further the term of this Use Agreement upon terms and conditions mutually acceptable to the parties. During such negotiations Metricom shall continue delivery of the Services upon the same terms and conditions provided herein until such time as (a) Metricom and the City complete the negotiations and the parties enter into a new Use Agreement or (b) either party gives written notice to the other party that the negotiations shall cease and that the Use Agreement shall expire sixty (60) days from the date of said notice.

2.4 Future Right-of-Way Ordinance. Upon the adoption by the City of an ordinance or policy regulating providers of telecommunications or other users of the Public Right-of-Way and applicable to Metricom, the City shall notify Metricom of any provision of this Use Agreement that is inconsistent with such ordinance or policy. Metricom and the City shall then enter into good faith negotiations to resolve such inconsistencies. During such negotiations Metricom shall continue delivery of the Services upon the same terms and conditions provided herein until such time as (a) Metricom and the City complete the negotiations and the parties enter into a new or amended Use Agreement or (b) either party gives written notice to the other party that the negotiations shall cease and that the Use Agreement shall expire (i) sixty (60) days from the date of said notice or (ii) at the end of the then-current term of the Agreement, whichever shall last occur.

2.5 Reservation of Rights.

2.5.1. In addition to any rights specifically reserved to the City by this Use Agreement, the City reserves to itself every right and power available to it under the constitutions of the United States and the State of Missouri, and any other right or power, including, but not limited to all police powers and authority to regulate and legislate to protect and promote the public health, safety and welfare. Further, the City hereby reserves to itself the right to intervene in any suit, action or proceeding, involving the provisions herein.

2.5.2. Notwithstanding anything to the contrary set forth herein, the provisions of this Use Agreement shall not infringe upon the rights of any person under any applicable state or federal statutes, including, but not limited to the right to occupy the Public Right-of-Way and easements.

3. AUTHORIZED USE.

3.1 City Authority. Any and all rights expressly granted to Metricom under this Use Agreement 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 exclusively or concurrently with any other Person or Persons and shall be further subject to all deeds, easements, dedications, conditions, covenants,

restrictions, encumbrances, and claims of title of record which may affect the Public Right-of-Way. Any work performed pursuant to the rights granted under this Use Agreement is subject to the reasonable prior review and written approval of the City, not to be unreasonably withheld or delayed, as provided herein.

3.2 Attachment to Municipal Facilities.

Subject to City approval as provided in Section 4, the City authorizes and permits Metricom to enter upon the Public Right-of-Way and to locate, place, attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Radios in or on Municipal Facilities for the purpose of providing Services to Persons located within or without the limits of the City. In addition, Metricom shall have the right to draw electricity for the operation of the Radios from the power source associated with each such attachment to Municipal Facilities. All electric power for the Radios shall be obtained by Metricom and paid for by Metricom at its sole expense.

3.3 Use of Public Right-of-Way. Subject to City approval as provided in Section 4, the City authorizes and agrees to permit Metricom to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Radios on any utility poles and/or other facilities owned by utility companies or owned by other entities or Persons located within the Public Right-of-Way for the purpose of providing Services to Persons located within or without the limits of the City, subject to Metricom, at its sole expense, obtaining permission from said utility companies or other entities or Persons.

3.4 No Property Rights Granted. Nothing in this Use Agreement shall be deemed to grant, convey, create, or vest in Metricom a temporary or perpetual real property interest in land, including any fee, leasehold interest, or easement.

3.5 Use Agreement Extends Only to Installation of Radios. The rights granted Metricom under this Use Agreement extend only to the installation of Radios on Public Right-of-Way, and does not create any right to install different or additional facilities, including but not limited to Wired Access Points, utility poles or other structures, in the Public Right-of-Way or on Municipal Facilities or on other property. Under no circumstances is the closing, excavation or opening of any Public Right-of-Way authorized or permitted under this Use Agreement.

3.6 No Interference. In the performance and exercise of its rights and obligations under this Use Agreement, Metricom shall not interfere in any manner with the existence, operation or use of any and all public and private rights-of-way, roads, streets, sanitary sewers, water mains, storm sewers and drains, gas mains, poles, aerial and underground electric and telephone wires, electroliers, cable television, and other telecommunications, utility, and municipal property without the express prior written approval of the owner or owners of the affected property or properties.

3.7 Emergencies, Natural Disasters. If an emergency or natural disaster occurs, the City, any agency, their employees, agents and contractors have first priority for access to the Public Right-of-Way. Public service utilities

which have valid franchises granted by the City shall have secondary priority for access to the Public Right-of-Way. Metricom's right to access to the Public Right-of-Way shall be subordinate to the City, such agencies and franchisees and may be limited by the City during an emergency or natural disaster without liability to the City.

4. CITY APPROVAL.

4.1 City Review and Approval of Radio Installation and Work. Before installing, maintaining, removing or relocating any Radio on any Municipal Facility located within the Public Right-of-Way, Metricom shall file with the City Engineer and the Board of Aldermen a statement disclosing the location and nature of the work to be performed, including the method of attachment or detachment. If the work requires any permits under applicable City ordinances, Metricom shall also apply and pay for all such permits. Approval shall not be given if, in the reasonable judgment of the City Engineer, the facilities do not have electrical service adequate or appropriate for Metricom's Radios or cannot safely bear the weight or wind loading caused by the presence of Metricom's Radios or would be rendered unsafe or unstable by the installation of a Radio.

4.2 Safety Concerns. Metricom shall provide such technical information to the City's reasonable satisfaction establishing that (a) the Radios are free from hazardous material or substances that might be released during their installation, maintenance, operation or removal and (b) there is no potential for harmful exposure to electromagnetic fields due to the operation of the Radios.

4.3 Exclusion of Certain Municipal Facilities and Public Right-of-Way. The City may in its discretion designate certain Municipal Facilities and Public Right-of-Way as excluded from those on which Radios may be installed by Metricom, including but not limited to (a) ornamental or similar specially-designed streets lights or (b) historic districts or other architecturally significant areas, provided such districts or areas have been designated and regulated by the City for the preservation of historical or architecturally significant features.

4.4 Owner's Permission Required. For attachment to non-Municipal Facilities located within the Public Right-of-Way, Metricom shall provide written proof by a duly authorized representative of Ameren/UE (or any successor utility) or other owner (collectively, "Owner") of the facility upon which any Radio is secured that Metricom has permission from the Owner to install the Radios. Metricom accepts and acknowledges that if the Owner is in violation of its franchise agreement with City, Metricom may be required by City, in its sole discretion, to remove its Radios from such facilities.

4.5 Approval not to be Unreasonably Withheld, Conditioned or Delayed. No Radio may be installed, maintained, removed or relocated without the prior written approval of the City Engineer, including the issuance of any required permits. Such approval shall not be unreasonably withheld, conditioned or delayed.

5. INSTALLATION, REMOVAL AND RELOCATION OF RADIOS.

5.1 Permits. If the attachment, installation, operation, removal, reattachment, reinstallation, relocation, replacement, or maintenance of Radios shall require any construction work and/or maintenance of traffic during such work in the Public Right-of-Way, Metricom, prior to beginning such work, shall apply for and obtain all permits required by law.

5.2 Schedule. Before beginning installation of any Radios, Metricom shall provide to the City a schedule for installation of the Radios.

5.3 Standards. Metricom shall install, maintain, operate, remove and relocate its Radios: (a) so as to minimize inconveniencing the general public and not interfere with the Public Rights-of-Way or the legal rights of any property owner, including the City, (b) so as to not endanger any Person or property, and to that effect shall use commonly accepted methods and devices for preventing failures and accidents which may cause damage, injuries, or nuisances, (c) in such a manner that will not interfere with any other installation or service as provided in Section 3.6 hereof, and (d) in a good and workmanlike manner, and according to the National Electrical Safety Code of the American Standards Institute, the National Electrical Code of the National Fire Protection Association, and all other applicable ordinances, statutes, regulations, rules and laws as may be presently in effect or changed in the future.

5.4 Documentation. Within thirty (30) days of the installation, removal or relocation of Radios, Metricom shall furnish documentation to the City showing the exact location of the Radios in the Public Right-of-Way, including

a pole list. Such documentation shall be furnished in hard copy and, if available and on request by the City, in electronic format.

5.5 Damage to Public Right-of-Way, Municipal and Other Facilities. Whenever the installation, operation, maintenance, removal, reattachment, reinstallation, relocation or replacement of a Radio shall cause the Public Right-of-Way or Municipal Facilities or other facilities located therein to be damaged, then Metricom, at its sole expense, shall promptly repair and return damaged Public Right-of-Way or Municipal Facilities or other facilities to a safe and satisfactory condition, normal wear and tear excepted. If Metricom does not make repairs as required to the Public Right-of-Way or Municipal Facilities within a reasonable period of time, then the City may perform or cause to be performed such reasonable and necessary work on behalf of Metricom and charge Metricom for actual expenses incurred. Upon the receipt of a demand for payment by the City, Metricom shall pay or dispute such amount in writing within thirty (30) days. Any written dispute shall disclose the reason why Metricom contends it should not be responsible for payment. Any damage to any private property shall be resolved directly between Metricom and the owner of such damaged property.

5.6 Tree Protection. In the attachment, installation, operation, maintenance, removal, reattachment, reinstallation, relocation or replacement of Radios, Metricom shall neither remove, cut, nor damage any trees in and along the streets, alleys and public places of the City. Tree trimming and pruning may be permitted to occur only after prior written

notice to the City of the extent of trimming and pruning to be performed and the prior written approval thereof by the City. The type and extent of trimming and pruning shall be in accordance with the requirements of the City.

5.7 Required Relocation/Removal.

Metricom understands and acknowledges that the City may require Metricom to relocate or remove, and Metricom shall, at the City's direction, relocate or remove, upon fifteen (15) business days' prior written notice in situations described in subsection (a) below, and within 48 hours in situations described in subsections (b) and (c) below, at Metricom's sole expense, any Radio whenever the City reasonably determines that the relocation is needed: (a) to facilitate or accommodate the construction, completion, repair, relocation or maintenance of any City or other government agency construction project within the City or any project performed by a private developer to meet a development or redevelopment condition or other City requirement, including any project which replaces the cobra head type street lighting with pedestrian scale decorative street lighting; (b) because the Radio is interfering with or adversely affecting proper operation of street lights, traffic signals or any other public, City-owned, or privately owned facilities, whether or not located within the Public Right-of-Way in violation of applicable Federal Communications Commission rules and regulations; or (c) to protect or preserve the public health, safety or welfare. If Metricom fails to relocate or remove any Radios as required by the City, then the City shall be entitled to remove the Radios at Metricom's sole expense. If an emergency or natural disaster occurs, or if other circumstances are

such that the preservation of the public health, safety or welfare requires immediate removal or relocation of any Radio, the City shall be entitled to remove such Radio without liability to the City, provided, however, that the City shall notify Metricom in writing within 48 hours of such removal.

5.8 Abandonment and Non-Use. Metricom shall promptly notify the City in writing of any Abandoned Radio and any Radio not placed in service for a continuous period of six (6) months, and Metricom shall remove any such Radio. If Metricom fails to do so, then the City, at its option, may remove such Radio at Metricom's sole expense. The City shall not remove any such Radio unless and until the City first gives fifteen (15) days' prior written notice to Metricom.

5.9 Condemnation or Vacation of Land. If any real estate containing the Radios is taken, condemned, or vacated in whole or in part, by the City or any government agency, Metricom, notwithstanding anything in this Use Agreement to the contrary, shall remove the Radios from such real estate at its sole expense within the time period required by the condemnor, vacating entity, or the court. Metricom shall not be entitled to any condemnation award or portion thereof.

6. Compensation. 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.

6.1 Reimbursement of Expenses. Metricom shall pay the City the sum of Ten Thousand and no/100's Dollars (\$10,000.00) as compensation

for the City's expenses associated with the preparation, issuance, implementation and administration of this Use Agreement.

6.2 Fee for Usage of Public Right-of-Way.

6.2.1. Fee Defined.

Metricom shall pay to the City on a quarterly basis a Right-of-Way fee in an amount equal to five percent (5%) of Metricom's Adjusted Gross Revenues. The fee shall be due and payable on or before the 45th day after the end of each calendar quarter and shall be accompanied by 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. The payment obligation shall survive the termination or expiration of this

Use Agreement
until paid.

6.2.2. Fee Terms.

If Metricom discovers that it has failed to pay the entire or correct amount of the Right-of-Way Fee due, the City shall be paid by Metricom within 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 from Metricom. 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. Except as provided herein, the Right-of-Way Fee shall be paid in addition to, not instead of, any other amounts of money which Metricom is required to pay to the City under this Use Agreement, by any other contract with the City, or under the City's taxing or regulatory authority.

6.2.3 Reduction of Right-of-Way Fee by Amount of Telecommunications, Utility Users or Communications Tax. If the Services are or become subject to a telecommunication s, utility users or communications tax (or similar tax or fee) or other gross receipts tax on the Adjusted Gross Revenues or a portion thereof during the term of

this Use Agreement, Metricom shall receive an offset and reduction in the Right-of-Way Fee owed in the amount of the tax actually paid by Metricom to the City for the applicable Right-of-Way Fee payment period. In no event shall the offset or reduction exceed the amount of the Right-of-Way Fee owed.

6.3 Municipal Facilities Fee. As compensation for the use of Municipal Facilities, Metricom shall pay to the City an annual fee of sixty Dollars (\$60.00) for the use of each Municipal Facility upon which a Radio has been installed (the "Municipal Facilities Fee") as provided herein. The Municipal Facilities Fee shall be due and payable on July 1 of each year and shall be calculated by multiplying the number of Municipal Facilities used by Metricom during the preceding twelve (12) months by the Municipal Facilities Fee, prorated as appropriate.

6.4 CPI Adjustment. Effective commencing on the third (3rd) anniversary of the Installation

Date and continuing every three (3) years thereafter, the Municipal Facilities Fee shall be adjusted with respect to the ensuing three-year period by a percentage amount equal to the percentage change in the U.S. Department of Labor, Bureau of Labor Statistics Consumer Price Index (All Items, All Consumers, 1982-1984=100) which occurred during the previous three-year period for the Midwest Urban Consolidated Metropolitan Statistical Area.

6.5 Fee Statement, Inspection Right, Audit Right, Financial Records, Disclosure.

6.5.1 The Fee Statement shall set forth:

6.5.1.1 The amount of Adjusted Gross Revenue as defined in section 1.1 hereof.

6.5.1.2 The calculation of the Fee based on the Adjusted Gross Revenue.

6.5.2. Inspection of Records. For the purpose of confirming the accuracy of any Fee Statement and

Fee paid, the City may inspect copies of Metricom's records at any time during the term hereof, during regular business hours, on at least fifteen (15) days' prior written notice ("Inspection"). The City's right of Inspection shall be limited to the extent necessary to confirm the accuracy of a Fee Statement and the amounts set forth thereon and the Fee paid pursuant thereto. Copies of the relevant records shall be made available to City, at Metricom's expense, at the Metricom regional office nearest the City or at such other location within the St. Louis metropolitan area, as agreed by the parties. If the results of any such Inspection indicate that Metricom underpaid a Right-of-Way Fee payment by more

than five percent (5%), then in addition to such underpayment, Metricom shall pay, (i) the reasonable costs of the Inspection, up to the lesser of two (2) times the amount of such underpayment or five thousand dollars (\$5,000.00). This right of Inspection shall not entitle City to a full review of all records and is limited only to those records necessary to verify the accuracy of the representations made by Metricom on the Fee Statements.

6.5.3. Audit. In addition to the Inspection right set forth above, at such time as the City may request, but in no event more frequently than once every twelve (12) months, City or its designee, may examine and audit the original

financial records of Metricom relevant for the purposes of determining the accuracy of any Fees paid by Metricom to City during the period from the prior audit ("Audit") or the Effective Date in the case of the first Audit. All Audits shall take place in the Metricom headquarters currently located at 333 West Julian Street, San Jose, California 95110 ("Metricom Headquarters") and may be conducted by a representative of City. Unless any underpayment was paid pursuant to the City's Inspection right under Section

6.5.2, if the results of an Audit indicate that Metricom underpaid the Right-of-Way Fee by more than five percent (5%), then in addition to such underpayment, Metricom shall pay, (i) the

reasonable costs of the Audit, up to the lesser of two (2) times the amount of such underpayment or five thousand dollars (\$5,000.00) and, (ii) the reasonable transportation expense of one representative of the City to the Metricom Headquarters to conduct the Audit. Metricom reserves the right to arrange for such transportation on behalf of such designee.

6.5.4. Financial Records. All original financial records of Metricom shall be kept at Metricom Headquarters. Metricom shall keep accurate financial records. During the performance of any Inspection and/or Audit, a representative of Metricom will be allowed to be present at all times.

No copies of any information reviewed during any Audit may be retained by the City without, in each case, the expressed written consent of Metricom.

6.5.5. Disclosure.

Metricom shall disclose to the City the identity and contact information of all Persons other than Metricom using Metricom's Radios located in the Public Right-of-Way to provide Services to Persons located within or without the limits of the City.

Metricom shall make such information available on its web site currently at: or **www.ricochet.com**


. Such information shall be updated in a commercially reasonable manner.

In addition, in conjunction with the Inspection and Audit, upon request, City will be provided a

written list of the
identity and contact
information of all
such Persons.

6.6 Billing. Metricom agrees that the compensation paid to City is for an integral cost of providing the service and is compensation for use of the Public Right-of-Way and is in no regard a tax.

6.7 Municipal Access Program.

In consideration of the City's execution and delivery of this Use Agreement, 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  basic service subscriptions. The number of free subscriptions which the City may receive shall be determined in accordance with the City's official population, as shown on the latest available census data, as follows: (a) for municipalities with a population of less than 100,000, up to a maximum of ten (10) free subscriptions; (b) for municipalities with a population of between 100,000 and 249,000, up to a maximum of fifteen (15) free subscriptions; (c) for municipalities with a population of between 250,000 and 500,000, up to a maximum of twenty (20) free subscriptions; and (d) for municipalities of over

500,000, up to a maximum of twenty-five (25) free subscriptions. The 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 Network Real Estate Department at the address stated in ¶9. The City's right to use the subscriptions shall commence at the time that 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 Public Rights of Way, whichever is longer. The City's use of the subscriptions shall be subject to the standard Ricochet terms and conditions of use. The 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 may be obtained from an authorized retailer at market rates current from time to time. The City shall use all subscriptions provided pursuant to this section solely for its own use 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.). The level of benefits and services provided to the City by Metricom as "basic service" shall not be diminished or reduced during the term of this Use Agreement or renewal thereof prior to its cancellation or termination, as the case may be.

7. INDEMNIFICATION AND WAIVER.

7.1 Indemnification. Metricom, at its sole cost and expense, hereby agrees to indemnify, protect, defend (with counsel acceptable to the City) and hold harmless the City, its elected officials, officers and employees from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and expenses of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or proximately, in whole or in part, out of the fact that the City granted this Use Agreement to Metricom, the rights granted to Metricom, or the activities performed, or failed to be performed, by Metricom under this Use Agreement, or

otherwise, except to the extent arising from or caused by the negligence or willful misconduct of the City, its elected officials, officers, employees and agents. This indemnification is limited to the extent of the City's liability under applicable sovereign immunity statutes, and it shall survive the expiration or termination of this Use Agreement for a period of five (5) years after the effective date of expiration or termination.

7.2 Waiver. Metricom hereby waives any and all claims, demands, causes of action, and rights it may assert against the City, its elected officials, officers and employees on account of any loss, damage, or injury to any Radio or any loss or degradation of the Services as a result of the attachment, installation, operation, removal, reattachment, reinstallation, maintenance, replacement or relocation of any Radio or facility to which any such Radio is attached, except to the extent of the cost of repair or replacement to damaged Radios arising from the negligence or willful misconduct of City, its corporate authorities, officers, employees or agents-. Metricom waives and releases any and all claims contesting the legality of this Use Agreement or the

authority of the parties to enter into this Use Agreement.

7.3 Breach or Violation Not a Waiver. The waiver 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.

8. INSURANCE AND BOND.

8.1 Insurance Required.

Metricom, and any contractor hired by Metricom, shall not commence work under this Use Agreement until they have obtained the insurance required herein. If any insurance is written with a deductible or self-insured retention, Metricom and its contractor shall be solely responsible for said deductible or self-insured retention. The purchase of insurance and the furnishing of a certificate of insurance shall not be a satisfaction of Metricom's indemnification of the City. Metricom is responsible to meet all OSHA requirements for on-the-job safety. Metricom and any contractors hired by Metricom shall procure and maintain during the life of this Use Agreement the following coverages:

(a) Workers' Compensation Insurance in accordance with all applicable statutes of the State of Missouri. Coverage shall include Employers Liability Coverage.

(b) Commercial General Liability Insurance on an "occurrence" basis with limits of liability not less than \$2,000,000 per occurrence and \$2,000,000 in the aggregate for Personal Injury, Bodily Injury and Property Damage. Coverage shall include the following extensions:

(1)
Contr
actual
Liabili
ty

(2)
Produ
cts
and
Comp
leted

Opera
tions

(3)
Indep
endent
Contr
actors
Cover
age

(4)
Broad
Form
Gener
al
Liabili
ty
Exten
sions
or
equiva
lent

(c) Motor Vehicle
Liability Coverage
for all vehicles
used in the
performing of the
Use Agreement.
Limits of liability
shall not be less
than \$2,000,000 per
occurrence and
\$2,000,000 in the
aggregate for
Bodily Injury and
Property Damage.

(d) Additional
Insured.
Commercial

General Liability Insurance as described above shall include an endorsement stating that the City, its elected and appointed officials, its employees and volunteers, its boards, commissions and/or authorities and all members thereof, employees and volunteers, shall be additional primary insureds.

(e) Cancellation Notice. Workers' Compensation Insurance, Commercial General Liability Insurance, and Motor Vehicle Liability Insurance as described above shall include an endorsement stating that thirty (30) days advance written notice of cancellation, nonrenewal, reduction and/or material change shall be sent to:

City
of St.
Louis
Board
of
Public
Service
1200
Market
Street
Room
301
St.
Louis,
MO
63103
Attention:
President

(f) Proof of
Insurance.
Metricom shall
within thirty (30)
days of the
Effective Date of
this Use Agreement
supply certificates
of insurance to the
City showing the
City, its entities and
representatives as
noted above as
additional primary
insureds.

8.2 Insurance Carrier Standard.
All insurance coverages shall be

with insurance carriers reasonably approved by the City. All insurance carriers shall be admitted and authorized to do business in Missouri 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 certificates issued by non-admitted insurance companies are not acceptable.

8.3 Additional Requirements.

All of the policies of insurance referred to in the preceding paragraph shall be issued in favor of the City on forms reasonably approved by the City Attorney. Metricom or its contractors shall pay all of the premiums therefor and deliver certificates thereof to the above noted City official, and if Metricom fails either to effect such insurance in the names or amounts herein called for or to pay the premiums therefor, upon fifteen (15) days prior notice to Metricom, the City shall be entitled, but shall have no obligations, to effect such insurance and pay the premiums therefor, which premiums shall be repayable by Metricom to the City within fifteen (15) days. Each insurer shall agree, by

endorsement on the policy or policies issued by it, or by independent instrument furnished to the City, that it will give thirty (30) days written notice before the policy or policies in question shall be materially altered, non-renewed or canceled. If such coverage terminates or is canceled or reduced, Metricom shall, at least fifteen (15) days before such termination or within fifteen (15) days after the date of such written notice from the insurer of such cancellation or reduction in coverage, file with the above noted City official a certificate showing that the required insurance has been reinstated or provided through another insurance company or companies. Metricom further agrees that the City may require Metricom to increase insurance limits based upon the City's reassessment of insurance needs no more often than every three (3) years, provided that such increased insurance limits shall be reasonably related to the City's additional risk and provided further that the City gives Metricom ninety (90) days written notice of said increased insurance limits.

8.4 Bond Required. Prior to the commencement of any work under this Use Agreement, Metricom will furnish and keep

in force a good and sufficient bond, approved by the director of public works, of Thirty Dollars (\$30.00) per Radio, or such other comparable security instrument as may be approved by both the director of public works and Metricom, to secure the faithful performance by Metricom of all of the work, construction, installation, and removals required to be performed by Metricom under this Agreement within the time periods set forth hereunder.

(a) Procedures.

Before the surety is required to perform under the bond or before any sums are withdrawn from other security, the City will give written notice to Metricom:

(1)
descri
bing
the
act,
defaul
t or
failure
to be
remed
ied, or
the
damag
es,

cost
or
expen
ses
which
the
City
has
incurr
ed by
reason
of
Metric
om's
act or
defaul
t;

(2)
provid
ing a
reason
able
opport
unity
for
Metric
om to
remed
y the
existin
g or
ongoi
ng
defaul
t or
failure
, if
applic
able;

(3)
provid
ing a
reason
able
opport
unity
for
Metric
om to
pay
any
monie
s due
the
City
before
the
City
withdr
aws
the
amou
nt
from
the
securit
y
bond
or
other
securit
y, if
applic
able;

(4)
that
Metric
om
will

be
given
an
opport
unity
to
revie
w the
act,
defaul
t, or
failure
descri
bed in
the
notice
with
the
City
Mana
ger or
their
design
ee;

(5) a
period
of
thirty
(30)
days
shall
be
consid
ered
the
timely
grant
of a
reason
able

opport
unity
to
cure
any
defaul
t or
failure
;
provid
ed,
howev
er,
that if
the
reason
for the
notice
is the
failure
to
provid
e a
replac
ement
bond
at
least
fourte
en
(14)
days
prior
to the
expira
tion of
a
bond,
a
notice
of

seven
(7)
days
shall
be
suffici
ent.

(b) Continuous
Bond. Metricom
will replenish the
bond or other
security within
fourteen (14) days
after written notice
from the City that
there is a
deficiency in the
amount of the bond
or security.

9. NOTICES. Unless otherwise stated herein, all notices which shall or may be required or given pursuant to this Use Agreement shall be in writing and delivered personally or transmitted: (i) through the United States mail, by registered or certified mail, postage prepaid; (ii) by means of prepaid overnight delivery service; or (iii) by facsimile 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, as follows:

To the City:

City of St. Louis
Communications Division
4971 Oakland Avenue
St. Louis, MO 63110-1401
Attention: Communications
Commissioner

To Metricom:

Metricom, Inc.
333 W. Julian Street
San Jose, CA 95110
Attention: Network Real Estate

Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next day in the case of overnight delivery. Either party to this Use Agreement may, from time to time, designate any other person or address for this purpose by written notice to the other party in the manner set forth above.

10. MISCELLANEOUS PROVISIONS.

10.1 Paragraph Headings. The headings on the paragraphs in this Use Agreement are for the convenience of reference and shall not alter or affect the terms of such paragraphs.

10.2 Assignment/Transfer. This Agreement may not be assigned by Metricom without the express written consent of the City, by Resolution of the Board of Aldermen, which consent will not be unreasonably withheld, conditioned, or delayed. It shall not be deemed reasonable for the City to withhold its consent to any such proposed transfer, 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 Use Agreement by virtue of such 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 Use Agreement shall not, by itself, be deemed a reasonable basis for refusing or conditioning the City's consent. Metricom shall give to the City written notice of any proposed transfer for which notice is required hereunder and will provide the City with whatever documentation the City may reasonably require to evaluate the proposed transfer. The City agrees to respond to any request for its consent hereunder within forty-five (45) days after receipt of such request. If the City fails to grant or deny its consent within such period, the City shall be deemed to have granted its consent to the proposed transfer, unless such failure to grant or deny its consent comes as a result of a Board of Aldermen regularly scheduled recess. Notwithstanding the foregoing, the transfer of the rights and obligations of Metricom to a parent, subsidiary, successor or affiliate will not be deemed an assignment for the purposes of this Agreement.

10.3 Non-Exclusivity. This Use Agreement does not provide Metricom with exclusive use of any poles, property or structures located in the Public Right-of-Way. The City shall have the right to permit other Persons or entities, including but not limited to providers of telecommunications services, to install equipment or devices on structures located in the Public Right-of-Way.

10.4 Metricom Staff Availability. Metricom shall have sufficient staff to perform as allowed or required by this Use Agreement. Metricom staff shall be available to the City 24 hours a day, 7 days a week, regarding problems or complaints resulting from the

existence of the Radios in the Public Right-of-Way. The City may contact by telephone Metricom's network control center operator at telephone number (800) 873-3468 regarding such problems or complaints. Metricom shall notify the City in writing within ten (10) days of any change in this telephone number. All Metricom employees or contractors working within the Public Right-of-Way shall carry at all times appropriate documentation identifying such persons as Metricom employees or contractors.

10.5 Exhibits and Schedules Part of Use Agreement. All exhibits and schedules referred to in this Use Agreement, or in any duly executed amendment to this Use Agreement, are by such reference incorporated in this Use Agreement and shall be deemed a part of this Use Agreement. Metricom agrees to fully comply with all of the obligations and terms of the exhibits and schedules.

10.6 Successors. This Use Agreement is binding upon the successors of the parties hereto.

10.7 Attorneys' Fees. Should any dispute arising from this Use Agreement lead to litigation, both parties shall bear their own costs of suit, including attorneys' fees.

10.8 Taxes. Except as otherwise provided herein, no provision of this Use Agreement shall be construed to relieve Metricom, its employees, contractors, and agents from the payment of all applicable federal, state and City taxes.

10.9 Advertising, Signs or Extraneous Markings. Metricom shall not place or cause

to be placed any sort of signs, advertisements or other extraneous markings, whether relating to Metricom or any other person or entity, on any Municipal Facility, Radio, equipment or structure located on the Public Right-of-Way, excepting (a) such labels, numbers or other marks on the Radio(s) as approved by the City as are reasonably necessary to identify the Radio or Metricom for service, repair, maintenance or emergency purposes, or (b) as may be otherwise required or allowed to be affixed by law.

10.10 Relationship of the Parties. Metricom and the City shall be and act as independent contractors, and under no circumstances shall this Use Agreement be construed as one of agency, partnership, joint venture, or employment between the parties.

10.11 Severability. If any one or more of the provision or provisions of this Use Agreement is determined by a 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 Use Agreement and shall not affect the validity of the remaining portions of this Use Agreement.

10.12 Amendments. This Use Agreement may not be amended except by written agreement signed by duly authorized representatives of the City and Metricom.

10.13 Applicable Law and Venue. This Use Agreement shall be governed and construed by, and in accordance with, the laws of the State of Missouri, and the ordinances, regulations and written policies of the City. If any lawsuit is brought by any Person or by a party to this Use Agreement, the parties agree

that such lawsuit shall be tried in the applicable federal or state court located in Missouri and having jurisdiction over the City and Metricom.

10.14 Compliance With Laws. In performing services or activities and exercising its rights and obligations under this Use Agreement, Metricom shall comply with all applicable federal, state and local laws, ordinances, regulations and policies, including, but not limited to, all laws, ordinances, regulations and policies concerning zoning or Equal Opportunity Employment, hiring or training.

10.15 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 the parties relating to the subject matter of this Use Agreement which are not fully expressed herein.

10.16 Most Favored Municipality. Should Metricom enter into a right-of-way use agreement after the Effective Date with a municipality located within the St. Louis Metropolitan Statistical Area, which agreement contains a definition of adjusted gross revenues or a formula for calculating the right-of-way fee which are in the City's sole opinion superior to those in this Use Agreement, Metricom shall, within sixty (60) days of the request by the City, modify this Use Agreement to incorporate the same or a substantially similar definition or clause.

IN WITNESS WHEREOF, this Use Agreement is executed on the day first written by persons duly authorized to bind the City and Metricom.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

Metricom: METRICOM, INC.,

a Delaware corporation

By:

Its:

Attest:

Its:

City: on behalf of CITY OF ST. LOUIS, a Missouri municipal corporation

By: _____

Communications Commissioner

[name typed]

COMPTROLLER

By: _____

[name typed]

Date: _____

APPROVED AS TO FORM:

FILED WITH:

City Counselor Date

Register Date

COMPTROLLER DOCUMENT NUMBER: _____

EXHIBIT A

Poletop Radio Specifications:	All specifications are typical unless otherwise noted.
Radio Density:	7 radios per sq. mile average in a suburban environment. This number varies with RF propagation characteristics. The primary method of installation is streetlight mounting with an AC power photocell adapter as the only wired connection.
Transmitter Output Power	1W max output per FCC Part 15.247.
Transmit frequencies:	902 to 928 MHz and 2.400 to 2.4835 GHz frequency bands per FCC Part 15.247
Weight:	10 lbs. (Radio) 16 oz. (Bracket) 12 oz. (Power Adapter)
Wind Load:	1/3 sq. foot
Antennas:	900 MHz, one external omni directional antenna, 23" max. length. 2.4 GHz directional antenna array is used with Network radios. It is an integral antenna, radome and switch assembly. Four directional patch antennas pointing in 90-degree directions are selected one at a time by the single-pole, four-throw switch assembly.
Prime power:	85 to 288 VAC, single phase. 26.3 watts average power consumption

Temp. Range (Operating) -40 deg.C to +60 deg.C

Temp. Range (Storage) -40 deg.C to +80 deg.C

Rain Tightness Meets MIL-STD-810, Method 506.3 (Rain)

-

Legislative History				
1ST READING	REF TO COMM	COMMITTEE	COMM SUB	COMM AMEND
01/12/01	01/12/01	PU	02/01/01	
2ND READING	FLOOR AMEND	FLOOR SUB	PERFECTN	PASSAGE
02/02/01			02/09/01	04/16/01
ORDINANCE	VETOED	VETO OVR	SIGNED BY MAYOR	
65196			05/03/01	