

A REGULAR MEETING

Of The

TRAVERSE CITY LIGHT AND POWER BOARD

Will Be Held On

TUESDAY, January 26, 2010

At

5:15 p.m.

In The

COMMISSION CHAMBERS
(2nd floor, Governmental Center)
400 Boardman Avenue

Traverse City Light and Power will provide necessary reasonable auxiliary aids and services, such as signers for the hearing impaired and audio tapes of printed materials being considered at the meeting, to individuals with disabilities at the meeting/hearing upon notice to Traverse City Light and Power. Individuals with disabilities requiring auxiliary aids or services should contact the Light and Power Department by writing or calling the following.

Jessica Dezelski,
Administrative Assistant
1131 Hastings Street
Traverse City, MI 49686
(231) 932-4543

Traverse City Light and Power
1131 Hastings Street
Traverse City, MI 49686
(231) 922-4940

Posting Date: 01-22-10
5:00 p.m.

PLEDGE OF ALLEGIANCE

1. ROLL CALL

2. CONSENT CALENDAR

The purpose of the consent calendar is to expedite business by grouping non-controversial items together to be dealt with by one Board motion without discussion. Any member of the Board, staff or the public may ask that any item on the consent calendar be removed therefrom and placed elsewhere on the agenda for full discussion. Such requests will be automatically respected. If an item is not removed from the consent calendar, the action noted in parentheses on the agenda is approved by a single Board action adopting the consent calendar.

- A. Consideration of approving minutes of the Study Session of January 4, 2010.
- B. Consideration of approving minutes of the Study Session of January 5, 2010.
- C. Consideration of approving minutes of the Regular Meeting of January 12, 2010.

3. OLD BUSINESS

None as of January 22, 2010

4. NEW BUSINESS

- A. Consideration of approving Dark Fiber Services Agreement. (Arends)
- B. Consideration of the purchase of real property – non-generation related. (Possible closed session) (Rice)

5. REPORTS AND COMMUNICATIONS

- A. From Legal Counsel:

None as of January 22, 2010

- B. From Staff:

- (1) Verbal update re: TCL&P M-72 Wind Turbine. (Rollenhagen)
- (2) Verbal update re: signal employee joining Light & Power (Rice)
- (3) TCL&P Strategic Planning Session on February 11 at the Hagerty Center at 5:00 p.m.
- (4) Joint Study Session with the City Commission on February 22 in the Commission Chambers.
- (5) Public Forums scheduled for February 25 and 27.

- C. From Board:

None as of January 22, 2010

6. PUBLIC COMMENT

/jd

**TRAVERSE CITY
LIGHT AND POWER BOARD**

Minutes of Light and Power Board Study Session
Held at 4:00 p.m., L&P Service Center
Tuesday, January 4, 2010

LIGHT AND POWER BOARD MEMBERS -

Present: Linda Johnson, Mike Coco, John Welch, John Snodgrass, Ralph Soffredine, Jim Carruthers

Absent: James Hoogesteger

EX OFFICIO MEMBER -

Present: Ben Bifoss, City Manager

OTHERS: Ed Rice, Tim Arends, Jim Cooper, Glen Dine, Jessica Dezelski, Karen Feahr, Mark Rollenhagen

The meeting was called to order at 4:00 p.m. by Chairperson Johnson.

Member Coco arrived at 4:07 p.m.

1. Discussion of wood fueled biomass vs. natural gas electric generation.

Ed Rice made a presentation comparing wood fueled biomass and natural gas electric generation.

2. Discussion of TCL&P Energy Supply Communication Plan.

Keith Schneider facilitated discussion among Board members and Light & Power staff regarding an Energy Supply Communication Plan.

3. Public Comment

- Marsha Kuren, 800 Cottage View Dr, Ratepayer
- Brian Beauchamp, 800 Cottage View Dr, Ratepayer
- Rod Long, 228 N. Monroe St, Ratepayer
- Tom Karas, 8801 Section Line Rd, Interlochen, Non-Ratepayer, Michigan Energy Alternative Project
- Eartha Melzer, 1009 Eighth St, Ratepayer
- Erik Zehender, Fountain Point Lake Leelanau, Non-Ratepayer

The meeting was adjourned at 6:21 p.m.

/jd

Edward E. Rice, Secretary
LIGHT AND POWER BOARD

**TRAVERSE CITY
LIGHT AND POWER BOARD**

Minutes of Light and Power Board Study Session
Held at 5:00 p.m., L&P Service Center
Tuesday, January 5, 2010

LIGHT AND POWER BOARD MEMBERS -

Present: Linda Johnson, Mike Coco, John Welch, John Snodgrass, Ralph Soffredine, Jim Carruthers

Absent: James Hoogesteger

EX OFFICIO MEMBER -

Absent: Ben Bifoss, City Manager

OTHERS: Ed Rice, Tim Arends, Jim Cooper, Glen Dine, Jessica Dezelski, Karen Feahr, Mark Rollenhagen

The meeting was called to order at 5:00 p.m. by Chairperson Johnson.

Member Snodgrass arrived at 5:03 p.m.

Member Coco arrived at 5:11 p.m.

1. Discussion of TCL&P Energy Supply Communication Plan.

Keith Schneider facilitated discussion among Board members and Light & Power staff regarding an Energy Supply Communication Plan.

2. Public Comment

- Margaret Dodd, 242 Washington St, Ratepayer
- John Wierenga, 4266 Westridge, Non-Ratepayer
- Corey Schichtel, 9090 M-37 S, Kingsley, Non-Ratepayer

The meeting was adjourned at 7:26 p.m.

/jd

Edward E. Rice, Secretary
LIGHT AND POWER BOARD

**TRAVERSE CITY
LIGHT AND POWER BOARD**

Minutes of Regular Meeting
Held at 5:15 p.m., Commission Chambers, Governmental Center
Tuesday, January 12, 2010

BOARD MEMBERS -

Present: Linda Johnson, Michael Coco, James Hoogesteger, John Snodgrass, Ralph Soffredine, Jim Carruthers

Absent: John Welch

EX OFFICIO MEMBER -

Present: R. Ben Bifoss

OTHERS: Ed Rice, Tim Arends, Jessica Dezelski, Mark Rollenhagen, Glen Dine

The meeting was called to order at 5:15 p.m. by Chairperson Johnson.

Moved by Carruthers, seconded by Coco to add a discussion of biomass feasibility studies to the agenda with possible closed session.

CARRIED unanimously. (Welch absent)

Chairperson Johnson added the item after Public Comment.

Executive Director Ed Rice requested that the Integrated Resource Plan be added to the agenda. Chairperson Johnson added the item under Old Business B.

2. CONSENT CALENDAR

Moved by Soffredine, seconded by Hoogesteger, that the following items, as recommended on the Consent Calendar portion of the agenda, be approved:

- A. Consideration of approving minutes of the Regular Meeting of December 22, 2009.

CARRIED unanimously.

3. OLD BUSINESS

- A. Moved by Coco, seconded by Soffredine, that the Board authorize the Executive Director to enter into a Service Agreement with TRICO TC Wind in an amount not to exceed \$100,000 for a new replacement generator for the TCL&P wind turbine, installation, and travel related expenses; subject to approval as to substance by the Executive Director, and approval as to form by counsel; and to authorize the Executive Director to administer amendments and change orders that are in the best interest of the department.

CARRIED unanimously. (Welch absent)

- B. Moved by Coco, seconded by Hoogesteger, that the Light & Power Board authorize the Executive Director to amend the agreement with R. W. Beck, Inc. for professional consulting services, the amendment to increase the not to exceed amount, from \$110,000 to \$135,000.

Roll call:

Yes: Johnson, Coco, Hoogesteger, Snodgrass, Soffredine, Carruthers

No: none

CARRIED. (Welch absent)

4. NEW BUSINESS

- A. Peter Haefner, CPA from Vredeveld Haefner LLC presented the audit for fiscal year end June 30, 2009.

Moved by Coco, seconded by Snodgrass, that the Light & Power Board accept the fiscal year 2008-09 financial audit as presented.

CARRIED unanimously. (Welch absent)

5. REPORTS AND COMMUNICATIONS

- B. (1) Ed Rice and Glen Dine spoke re: east side substation.
- C. (1) Vice Chairperson Coco congratulated staff on the audit results.
(2) Vice Chairperson Coco spoke re: financial statement questions.
(3) Vice Chairperson Coco spoke re: communication plan.
(4) Commissioner Soffredine spoke re: biomass and wind.
(5) Commissioner Carruthers spoke re: feasibility studies.
(6) Vice Chairperson Coco spoke re: communication plan.

City Manager Bifoss suggested that the Board consult with general counsel prior to going into closed session to discuss biomass feasibility studies. The Board was in agreement with the suggestion and decided not to go into closed session after Public Comment.

6. PUBLIC COMMENT

John Wierenga 4266 Westridge Drive, Non-Ratepayer

The meeting adjourned at 6:46 p.m.



**TRAVERSE CITY
LIGHT & POWER**

To: Light & Power Board
From: Tim Arends, Controller *MA*
Date: January 22, 2010
Subject: Dark Fiber Services Agreement

Recently, the City of Traverse City's contract with AT&T for T1 services at the DPS building lapsed requiring the city to negotiate a new T1 service agreement with AT&T or switch to the Light & Power dark fiber system for that site. Also, with the construction of the new parking deck the Auto Parking System has a need for dark fiber services from the parking deck on State Street to the new deck. These events created an opportunity for Light & Power and the City to come to an agreement that would have the City become a customer of the Fiber Fund.

While the immediate need for the City is to connect the DPS Building and the parking decks, the attached agreement is designed to allow the City to bring other sites into the system as need and/or economically feasible. It also provides for the possibility of a city loop that would connect all city buildings together, similar to what the county has done with their facilities.

The price being offered to the City under the proposed agreement is competitively priced and allows the City to benefit from the fiber system. Staff is recommending that the Board approve the proposed agreement because the addition of city facilities to the fiber system is consistent with the goals as outlined in the Updated Fiber Optics Rate Study and the goals and objectives that were established through Strategic Planning.

If the Board is in agreement with staff's recommendation the following motion would be appropriate:

**MOVED BY _____, SECONDED BY _____,
THAT THE LIGHT AND POWER BOARD AUTHORIZE THE EXECUTIVE DIRECTOR
TO ENTER INTO A DARK FIBER SERVICES AGREEMENT WITH THE CITY OF
TRAVERSE CITY; SUBJECT TO APPROVAL AS TO FORM BY GENERAL
COUNSEL, AND SUBJECT TO APPROVAL BY THE CITY COMMISSION.**

CITY OF TRAVERSE CITY
DARK FIBER SERVICES AGREEMENT

THIS DARK FIBER SERVICES AGREEMENT (“Agreement”) is made and entered into as of the ____ day of _____, 2010, by and between the TRAVERSE CITY LIGHT & POWER DEPARTMENT, a Michigan municipal electric utility, whose address is 1131 Hastings Street, Traverse City, Michigan 49686 (“TCL&P”), and CITY OF TRAVERSE CITY, whose address is 400 Boardman, Traverse City, Michigan, 49684, (“Customer”).

RECITALS

WHEREAS, TCL&P owns and/or operates fiber optic communications systems in metropolitan Traverse City (“TCL&P Systems”) as generally depicted and/or described on Exhibit 1 attached hereto (“TCL&P System Routes”); and

WHEREAS, Customer desires to obtain the exclusive right to use certain fibers (“Customer Fibers”) in TCL&P’s fiber optic cable (“Cable”) which are further described in Exhibit 1; and

WHEREAS, TCL&P is willing to grant Customer the exclusive right to use the Customer Fibers subject to the terms and conditions contained herein;

NOW THEREFORE, in consideration of the foregoing Recitals and the covenants and agreements set forth below, TCL&P and Customer hereby agree as follows:

ARTICLE I
DEFINITIONS

For purposes of this Agreement, words spelled with initial capital letters (other than proper names, section headings, and the beginnings of sentences) shall have the defined meanings set forth in the applicable provisions of this Agreement or in this Article I.

- 1.01 **“Acceptance Date”** shall mean the date that Customer delivers a Notice of Acceptance to TCL&P or the date that Customer uses the Customer Fibers for the purpose of delivering communications traffic (other than traffic which is transmitted only and solely for the purpose of testing the performance of the Customer Fibers).
- 1.02 **“Affiliate”** shall mean any Person that is directly or indirectly controlled by, or is under the common control with, the Customer and includes contractors of customers on the sites being served.
- 1.03 **“Costs”** shall mean the actual, reasonable direct costs paid or payable in accordance with the accounting procedures generally used by TCL&P including (i) direct costs and out of pocket expenses on a direct pass-through basis, (ii) internal labor costs, direct wages and salaries and overhead, and (iii) external costs of contractors, subcontractors or others providing service to TCL&P.

- 1.04 **“Customer Agreement” or “Agreement”** shall mean this Agreement entered into between Customer and TCL&P.
- 1.05 **“Dark Fiber Services”** shall mean the delivery of dark fiber and associated services to Customer pursuant to the terms and conditions of this Agreement and the Customer Agreement.
- 1.06 **“ERU”** shall mean the exclusive right to use the Customer Fibers.
- 1.07 **“Governmental Authority”** shall mean any federal, state, regional, county, city, municipal, local, territorial, or tribal government, whether foreign or domestic, or any department, agency, bureau or other administrative or regulatory body obtaining authority from any of the foregoing, including without limitation, courts, public utilities and other authorities.
- 1.08 **“Person”** shall mean any natural person, corporation, partnership, limited liability company, business trust, joint venture, association, company or Governmental Authority.

ARTICLE II GRANT OF RIGHTS

- 2.01 **Dark Fiber Services:** Customer has requested Dark Fiber Services and an exclusive right to use the Customer Fibers as set forth in Exhibit 1.
- 2.02 **Grant of ERU:** As of the Acceptance Date, TCL&P hereby grants to Customer and Customer hereby acquires from TCL&P an exclusive right of use for the purposes and subject to the limitations described herein, of the Customer Fibers along the TCL&P System Route (the “ERU”). During the Term of this Agreement, TCL&P shall not grant any other Person the right to use the Customer Fibers.
- 2.03 **Customer Fibers:** Exhibit 1 identifies the number of fibers, route mileage, configuration and consideration for the Customer Fibers to be granted to Customer hereunder.

ARTICLE III USE OF CUSTOMER FIBERS

- 3.01 **Customer Representation and Warranty:** Customer represents and warrants that it will use the Customer Fibers and the ERU granted hereunder in compliance with all applicable codes, ordinances, laws, rules and regulations of any applicable Governmental Authority.

- 3.02 **Permitted Use:** Subject to the provisions of this Agreement, Customer may use the Customer Fibers and the ERU for any lawful purpose. Customer acknowledges and agrees that it has no right to use any fibers, other than the Customer Fibers, included or incorporated in the TCL&P System, and that Customer shall keep any and all of the TCL&P System free from any liens, rights or claims of any third party attributable to Customer.
- 3.03 **Prohibited Use:** During the Term Customer shall have no right to, and TCL&P may enjoin Customer from any attempt to, assign, sell, lease, sublease, transfer, or grant an indefeasible right of use or other similar right or interest in the ERU, of the Customer Fibers of this Agreement to anyone other than an Affiliate of Customer or TCL&P.
- 3.04 **No Liens by TCL&P:** TCL&P agrees to keep any and all of the Customer Fibers free from any lien, rights or claims of any third party attributable to TCL&P which may materially and adversely affect the right of Customer to use the Customer Fibers hereunder. Notwithstanding the foregoing, nothing herein shall in any way limit TCL&P's right to assign this Agreement or pledge any interest in and to the TCL&P System or the Customer Fibers as collateral for indebtedness in favor of bondholders, a bank or creditor as part of security interest in the assets of TCL&P.

ARTICLE IV CONSIDERATION

- 4.01 **ERU Fee:** In consideration for the ERU granted to Customer hereunder, Customer agrees to pay to TCL&P the sums, and at the time or times, set forth on Exhibit 2 (the "ERU Fee").
- 4.02 **Other Fees:** In addition to the ERU Fee, Customer shall pay directly or reimburse TCL&P for all other sums, costs, fees and expenses which are expressly provided to be paid by Customer under this Agreement.
- 4.03 **Invoices:** TCL&P will send to Customer in advance invoices for payment of the ERU Fee and any other amounts due and owing hereunder. Customer shall pay such invoiced amounts within forty-five (45) days.
- 4.04 **Late Payments:** Any sums not paid when due hereunder shall be subject to a late payment interest charge of twelve (12) percent per annum.
- 4.05 **Failure to make payments:** In addition to any other rights and remedies under this Agreement failure to make any payment when due hereunder (inclusive of the applicable cure period) shall be a default in a material term of this Agreement.

ARTICLE V
TERM

- 5.01 **Term:** This Agreement shall commence as of the Acceptance Date of the first of the sites shown on Exhibit 1 and shall continue in full force and effect for the Initial Term of three (3) years unless terminated earlier or extended under the terms of this Agreement. Customer may renew this Agreement for three (3) additional five (5) year periods (each a "Renewal Term") by giving TCL&P written notice at least ninety (90) calendar days before to the end of the Initial Term or any Renewal Term. TCL&P shall have the right to increase the ERU Fee and the Recurring Charge at the beginning of a Renewal Term in accordance with Exhibit 2. If Customer does not so notify TCL&P of renewal or termination, this Agreement shall continue in effect on a month-to-month basis, until terminated by either party upon at least thirty (30) Calendar Days prior written notice to the other party. TCL&P may increase the ERU Fee at any time if the Customer is on a month-to-month basis.
- 5.02 **Expiration/Termination:** The Term of this Agreement shall continue until the earlier of (a) the end of the Term, if any, set forth above or (b) termination by either party in accordance with this Agreement.
- 5.03 **Multiple Site Connection.** The parties intend that all sites listed on Exhibit 1 may be connected to each other at the sole discretion of the Customer as the need arises or when it becomes economically beneficial to the Customer. The Initial Term of this Agreement shall commence on the Acceptance Date of any site listed on Exhibit 1.

ARTICLE VI
AUTHORIZATIONS

- 6.01 **TCL&P Authorizations:** TCL&P represents and warrants that it has obtained or will obtain all regulatory approvals, franchises, permits, orders, consents and rights-of-way, either by contract, franchise or some other agreement, and all other rights necessary (all of which are collectively referred to herein as the "Authorizations") to be obtained by TCL&P to enable it to construct, install and provide the Customer Fibers, grant the ERU to Customer, and perform all other rights and obligations hereunder. TCL&P shall use commercially reasonable efforts to cause such Authorizations to remain effective through the Term and any extensions thereof (or to replace such Authorizations with suitable replacement Authorizations). In the event that any Authorizations are discontinued and not replaced and the loss of such Authorizations prohibits the use of the Customer Fibers, TCL&P shall issue a rebate to Customer. The amount of the rebate shall be the pro-rata portion of the ERU Fee allocable to the remainder of the Term, in proportion to the number of fiber miles.

- 6.02 **Customer Authorizations:** Customer represents and warrants that it has obtained or will obtain prior to the Acceptance Date all Authorizations to be obtained by Customer necessary to enable it to use, operate, or access the Customer Fibers and the ERU granted hereunder and to perform all other rights and obligations hereunder. Customer shall use commercially reasonable efforts to cause such Authorizations to remain effective through the Term and any extensions thereof (or to replace such Authorizations with suitable replacement Authorizations.) The failure of Customer to maintain any Authorizations hereunder shall be a default pursuant to Article XVIII hereof.

ARTICLE VII
TESTING AND ACCEPTANCE

- 7.01 **Fiber Optic Cable:** The Customer Fiber will meet or exceed the Industry standards for high quality long haul Single Mode Fiber operating in the 1310 nm and 1550 nm frequency range.
- 7.02 **Testing:** TCL&P shall test the Customer Fibers in accordance with the testing procedures and standards also specified in Exhibit 3 (“Acceptance Testing Procedures”).
- 7.03 **Completion:** When TCL&P reasonably determines the Customer Fibers have satisfied the Acceptance Testing Procedure, TCL&P shall provide a written notice of completion to Customer (“Notice of Completion”).
- 7.04 **Customer Acceptance or Rejection:** Customer shall, within twenty-one (21) days of receipt of the Notice of Completion, either accept the Customer Fibers by delivering a notice of acceptance to TCL&P (“Notice of Acceptance”) or reject the Customer Fibers by delivering a notice of rejection (“Notice of Rejection”) to TCL&P specifying the defect or failure to meet the Specifications. The date of the Notice of Acceptance or any Deemed Acceptance, as defined herein, shall be the customer acceptance date (“Acceptance Date”). In the event Customer delivers a Notice of Rejection to TCL&P, TCL&P shall promptly, and at no cost to Customer, remedy the defect or failure specified in the Notice of Rejection. Thereafter, TCL&P shall again give Customer a Notice of Completion with respect to the Customer Fibers. Subject to Customer’s rights under Article XVIII to terminate a Service Order or this Agreement as provided for herein, the foregoing procedure shall apply again and successively thereafter until TCL&P has remedied all defects or failures specified by Customer. Any failure of Customer to deliver a Notice of Rejection by the twenty first (21st) day after Customer’s receipt of the Notice of Completion or any use by Customer of the Customer Fibers for the purpose of delivering communications traffic (other than traffic which is transmitted only and solely for the purpose of testing the performance of the Customer Fibers) shall be deemed to constitute Acceptance (“Deemed Acceptance”).

ARTICLE VIII
ACCESS

- 8.01 **TCL&P Control:** TCL&P shall control all activities concerning access to the TCL&P System, including the Customer Fibers.
- 8.02 **Work by TCL&P:** Any work required respecting the TCL&P System or the Customer Fibers required by Customer for any reason, including, without limitation, splicing of the Customer Fibers or the installation of handholes or other access points along the TCL&P System Route, shall be undertaken only by TCL&P as set forth in this Agreement.
- 8.03 **TCL&P Negligence or Willful Misconduct:** Customer shall not have any obligation to reimburse TCL&P for any Costs if such Costs were incurred or arose out of TCL&P's negligence or willful misconduct or TCL&P's breach of this Agreement.

ARTICLE IX
OPERATIONS

- 9.01 **No Interference By Customer:** Customer shall not intentionally or knowingly interfere with, or materially or adversely affect the use by any other Person of the TCL&P System and/or any electronic or optronic equipment used by such Person in connection therewith.
- 9.02 **No Interference By TCL&P:** TCL&P shall not interfere with, or materially or adversely affect or permit another Person under the control of TCL&P to interfere with, materially or adversely affect Customer's use of the Customer Fibers and/or any optronics, electronics, electric, optronic, or other equipment or related facilities used by Customer in connection therewith; provided, however, that TCL&P shall not be required to alter pre-existing uses of the TCL&P System to avoid adversely affecting new and presently unanticipated uses of the Customer Fibers by Customer. If a Person materially, adversely affects Customer's use of the Customer Fibers and such Person is in any way leasing, licensing or otherwise using (through an ERU or otherwise) any part of the TCL&P System, TCL&P shall require that such Person cease using the TCL&P System until such Person can do so without causing such material, adverse affect on Customer.
- 9.02 **No Obligation To Supply Electronics:** Customer acknowledges and agrees that TCL&P is not supplying nor is TCL&P obligated to supply to Customer any optronics or electronics or optical or electrical equipment, any related facilities, or any space for the placement thereof (except as agreed in any Customer Agreement or any other agreement executed by the Parties), all of which are the sole responsibility of Customer.

ARTICLE X
MAINTENANCE AND REPAIR OF THE CUSTOMER FIBERS

- 10.01 **TCL&P to Maintain and Repair:** From and after the Acceptance Date, the maintenance and repair of the TCL&P System including, without limitation of the Customer Fibers, shall be provided in accordance with the terms and conditions set forth herein. When performing maintenance and repairs, TCL&P shall in all cases use commercially reasonable efforts to minimize disruption of Customer's business operation and treat the Customer Fibers with at least as high a priority (subject to applicable law) as TCL&P treats any and all other fibers or Persons. All Normal Preventative Maintenance and Reactive Maintenance (as set forth in 10.06 and 10.07 respectively) shall be performed by TCL&P at TCL&P's cost as part of the Recurring Charge set forth in Article IV above. TCL&P shall be responsible for all maintenance and repair of Customer Fibers except to the extent that repair is necessitated by Customer's negligence or willful misconduct.
- 10.02 **No Maintenance By Customer:** Customer shall not, by it or by or through any agent or contractor, make any repair to or replacement of the Customer Fibers or any other equipment owned by TCL&P.
- 10.03 **TCL&P Emergency Control Center:** TCL&P shall operate and maintain one emergency control center staffed by trained and qualified personnel beginning with the Acceptance Date of any site shown on Exhibit 1. Customer shall promptly report the need for any unscheduled or emergency maintenance in Accordance with the procedures set forth herein using TCL&P's service number, which is 231-922-4942.
- 10.04 **Right to Subcontract:** TCL&P shall have the right to subcontract any maintenance performed hereunder for Customer, provided that TCL&P shall require any subcontractor to perform in accordance with the requirements and procedures set forth in this Agreement and all applicable industry standards. The use of any such subcontractor shall not relieve TCL&P of any of its obligations hereunder.
- 10.05 **Notice to Customer:** TCL&P shall give the Customer at least seven (7) days advance notice of preventive maintenance that includes an interruption of signal continuity.
- 10.06 **Preventive Maintenance:** Preventive maintenance is defined as the routine maintenance and repair of dark fiber. TCL&P performs routine maintenance, repair checks and services, including preventive inspections, as determined necessary by TCL&P to maintain dark fibers within the agreed upon specifications. Maintenance is performed to the TCL&P demarcation point. Customer may also request additional routine maintenance on dark fiber based on the backbone and on any secondary laterals past the TCL&P demarcation points on an individual case basis by detailing the request to TCL&P. Annual operation and maintenance charges ("Recurring Charge") do not provide coverage for any fiber laterals past the TCL&P demarcation points. All costs

incurred for the additional maintenance and services are charged back to the requesting customer.

- (a) Normal Preventive Maintenance Activities performed by TCL&P include, but are not limited to:
 - (i) Patrol and monitoring of the TCL&P backbone on a regularly scheduled basis;
 - (ii) Regular testing to establish thresholds for quality assurance on the TCL&P backbone;
 - (iii) Establishment and operation of a "Call-Before-You-Dig" program; and
 - (iv) Performance of all required cable locates and record-keeping on the TCL&P backbone.
- (b) In the event that preventive maintenance is canceled or delayed, TCL&P shall notify Customer at the earliest opportunity to reschedule the activity.

10.07 **Reactive Maintenance:** Reactive Maintenance is any non-routine maintenance and repair of dark fiber not identified as preventive maintenance, including repairs required as a result of cable cuts or natural or man-made disasters. Reactive maintenance is repair activity performed in response to any of the following:

- (a) Notification by the customer or notification by third party of any failure;
- (b) Interruption or impairment of dark fiber; and
- (c) Any event likely to cause the failure, interruption or impairment of dark fiber.

10.08 **Temporary Repairs:** TCL&P representatives are equipped to communicate with the customer during emergency unscheduled maintenance in order to provide regular updates throughout the repair process. When correcting or repairing cable discontinuity or damage, TCL&P uses reasonable efforts to respond, within 4 hours, to the customer to determine the repair of traffic-affecting problems within the time frames agreed to by both the customer and TCL&P. In order to meet those repair deadlines, TCL&P may approve temporary repairs until a more permanent repair is completed. Typically, TCL&P will be on-site, within the agreed to time, after receiving notice and service will be restored as soon as feasible. Within twenty-four (24) hours after completing a temporary repair, TCL&P begins planning for permanent repair, notifies the customer of those plans, and then implements permanent repairs as soon as possible.

ARTICLE XI
RELOCATION, REPLACEMENT AND CONDEMNATION
OF CUSTOMER FIBERS

- 11.01 **Relocation Request by Third Party:** If TCL&P receives notice of any request, intent or plan by any third party (“Relocation Request”), including but not limited to any Governmental Authority, to relocate any segment of TCL&P’s System Route affecting the Customer Fibers, TCL&P shall notify Customer of such Relocation Request and shall keep Customer advised of the status of any such proceedings and negotiations related thereto. If relocation is required as a result of any such Relocation Request, TCL&P shall give Customer at least sixty (60) days (or such lesser period of notice that TCL&P may have received) prior written notice of any such required relocation (“Relocation Notice”).
- 11.02 **Relocation Request by Customer.** If the Customer requests relocation of any segment of TCL&P’s System Routes, the Customer shall pay for the costs of such relocation if TCL&P does relocate the segment.
- 11.03 **Substitution by TCL&P:** Upon not less than ninety (90) days written notice from TCL&P to Customer, TCL&P may, at its option, subject to Customer’s prior written approval (which approval shall not be unreasonably withheld, conditioned, or delayed) substitute for the Customer Fibers, an equal number of alternate fibers of like or better quality within the TCL&P System Route or portion thereof; provided that in such event, such substitution (i) shall be in accordance with Customer’s applicable specifications and operating procedures; (ii) shall be effected at the sole cost of TCL&P, including without limitation, all disconnect and reconnect costs, fees and expenses; (iii) shall be tested in accordance with and shall satisfy the Acceptance Testing Procedures as set forth on Exhibit 3; and (iv) shall not unreasonably interrupt the operation or performance of Customer’s network or business.
- 11.04 **Replacement:** In the event all or any part of the Customer Fibers shall require replacement during the Term of this Agreement, such replacement shall be made as soon as reasonably practicable at TCL&P’s sole cost and expense; except, however, if the replacement of the Customer Fibers is required as a result of the negligence or intentional misconduct of Customer, TCL&P shall replace the Customer Fibers and Customer shall pay all Costs associated therewith.
- 11.05 **Condemnation:** In the event any portion of the TCL&P System Route, Customer Fibers, and/or the rights-of-way in or upon which they shall have been installed, become the subject of a condemnation proceeding which is not dismissed within one hundred eighty (180) days of the date of filing of such proceeding and which could reasonably be expected to result in a taking by any Governmental Authority or other party cloaked with the power of eminent domain for public purpose or use, both parties shall be entitled, to the extent permitted under applicable law, to participate in any condemnation proceedings

to seek to obtain compensation by separate awards for the economic value of their respective interests in the portion of the TCL&P System and/or Customer Fibers subject to such condemnation. TCL&P shall notify Customer as soon as practicable of receipt of any notice of any condemnation proceeding filed against the TCL&P System, Customer Fibers or rights-of-way in or upon which the TCL&P System or Customer Fibers have been installed. TCL&P agrees not to sell the Customer Fibers and or the rights-of-way to such acquiring agency or Governmental Authority or other party in lieu of condemnation without thirty (30) business day's prior written notice and approval by the Customer.

ARTICLE XII TITLE AND TAXES

- 12.01 **Beneficial Ownership:** Unless prohibited by law, TCL&P and Customer acknowledge and agree that Customer shall be treated, for accounting and federal and all applicable state tax purposes, as the exclusive beneficial owner of the Customer Fibers. Except as otherwise required by law, TCL&P and Customer shall file (or cause to be filed with respect to any consolidated returns) their respective tax returns and other returns and reports for their respective Taxes on such basis, and shall not take any positions inconsistent therewith.
- 12.02 **TCL&P Title:** TCL&P shall have undivided, absolute legal title to and ownership in the TCL&P System and the Customer Fibers subject to the Customer's rights, as provided herein.
- 12.03 **Taxes:** Parties hereby acknowledge the City is a tax-exempt organization.

ARTICLE XIII REPRESENTATIONS AND WARRANTIES

- 13.01 **Requisite Authority:** Each Party represents and warrants that: (i) it has the power and authority to enter into, execute, and deliver this Agreement; (ii) it has taken all requisite corporate action to approve the execution, delivery and performance of this Agreement; (iii) this Agreement constitutes a legal, valid and binding obligation enforceable against such party in accordance with its terms, subject to bankruptcy, insolvency, creditor's rights and general equitable principles; (iv) it shall not commit a breach of any other agreement as a result of executing this Agreement or as a result of the obligations imposed upon it hereunder; and (v) its execution of and performance under this Agreement shall not violate any applicable existing regulations, rules, statutes or court orders of any Governmental Authority.
- 13.02 **No Pending Claims:** Each Party represents and warrants to the other that there are no pending, or to the knowledge of such Party, threatened actions, suits, claims, condemnations or other proceedings (i) which would materially and adversely affect the

Customer Fibers being delivered hereunder by TCL&P, the TCL&P System, or the ability of either Party to consummate the transactions and perform the obligations contemplated hereby, (ii) which would result in any charge being levied against, or lien assessed on the Customer Fibers being delivered by TCL&P hereunder which lien would materially and adversely affect TCL&P's ownership or Customer's use of the Customer Fibers, or (iii) in which either Party is or will be a party by reason of either Party's interests in the Customer Fibers.

- 13.03 **Required Insurance:** Each Party represents and warrants that it has obtained and shall maintain throughout the Term of this Agreement, and shall require any of its subcontractors (if any) to obtain and maintain throughout the Term of this Agreement such insurance policies and coverages as set forth in Article XVI.
- 13.04 **No Broker:** Each party represents to the other that it has not retained any broker, finder, investment banker or other similar Person who is entitled to any brokerage fee, finder's fee or other similar fee or commission in connection with transactions described in this Agreement.
- 13.05 **Notification:** Each Party shall promptly notify the other Party of any matters pertaining to, or the occurrence (or impending occurrence) of, any event of which it is aware that could give rise to any damage or impending damage to or loss of the TCL&P System or Customer Fibers.
- 13.06 **Cooperation:** Customer and TCL&P agree to cooperate with and support each other in complying with the requirements applicable to their respective rights and obligations, including Authorizations hereunder by any Governmental Authority.
- 13.07 **Workmanship:** TCL&P represents and warrants that the Customer Fibers will be designed, engineered, installed and constructed substantially in accordance with the terms and provisions of this Agreement, any and all applicable building, construction and safety codes, as well as any and all other applicable Authorizations. Customer shall notify TCL&P in writing of its discovery of a deviation from the specifications set forth herein, within thirty (30) days of such discovery, and the construction or installation of the affected Customer Fibers shall be repaired to such specifications by TCL&P at TCL&P's sole cost and expense except to the extent that such deviation is the result of Customer's intentional acts or omissions. Notwithstanding the foregoing, in the event that Customer discovers a deviation from the plans for construction or installation of the TCL&P System which may materially adversely affect the operation or performance of the Customer Fibers, then Customer shall have a period of ninety (90) days after Customer's discovery of such defect within which to notify TCL&P, and the construction or installation of the affected portion of the Customer Fibers shall be repaired to such specification at TCL&P's sole cost and expense except to the extent that such deviation is the result of Customer's intentional acts or omissions. If TCL&P is unable to remediate any such

deviation, TCL&P shall coordinate substitution with Customer as set forth in Section 11.03 herein.

13.08 **Manufacturer's Warranty:** If there is an interruption, impairment in, defect in or failure of the Customer Fibers to perform in accordance with the applicable Cable vendor's or manufacturer's specifications with respect to the Customer Fibers, TCL&P shall, upon Customer's request, assign to Customer the particular Cable vendor's or manufacturer's warranty. In the event any maintenance or repairs to the TCL&P System are required as a result of a breach of any warranty made by any manufacturers, contractors, or vendors, unless Customer shall elect to pursue such remedies itself, which Customer shall have the right to do at its sole discretion, TCL&P shall pursue at its own cost and expense all remedies against such manufacturers, contractors or vendors on behalf of Customer, and TCL&P shall reimburse Customer's costs for any maintenance and repairs Customer has incurred as a result of any such breach of warranty.

13.09 **EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, TCL&P MAKES NO WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE CUSTOMER FIBERS OR THE TCL&P'S SYSTEM, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED.**

ARTICLE XIV
LIMITATION OF LIABILITY

14.01 **Limitations:** Neither party shall be liable to the other for any indirect, incidental, punitive, exemplary, special or consequential damages (including without limitation damages related to lost profits, toll fraud, loss of use, and loss of data, or failure to realize savings or benefits) arising under this agreement, even if advised of the possibility of such loss. The total aggregate liability of TCL&P, its suppliers, licensors, affiliates, directors, officers, and/or employees under or in connection with this agreement will be limited to proven direct damages not to exceed amounts actually paid by customer during the three-month period immediately preceding the date of the circumstances giving rise to the first claim for damages under this agreement.

14.02 **No third party beneficiaries.** There are no third-party beneficiaries to this Agreement.

ARTICLE XV
INSURANCE

15.01 **Required Coverages:** Each Party shall, at its own expense, secure and maintain in force, throughout the Term, general liability insurance, such that the total available limits to all insureds will not be less than three million dollars (\$3,000,000) in respect of injuries to or

death in any one person in any one occurrence and not less than five million dollars (\$5,000,000) in respect of injuries to or death of any number of persons aggregated over the policy year and not less than three million dollars (\$3,000,000) in respect to damage to or loss of use of property in any one occurrence, and worker's compensation and employer's liability insurance as required by the laws of all applicable Governmental Authorities. Such insurance may be provided in a policy or policies, primary and excess, including the so-called umbrella or catastrophe forms. The undertaking with respect to insurance shall not relieve either Party of its obligations hereunder. In addition, each Party shall comply with the insurance requirements in any underlying Authorizations (provided that such Party has knowledge of such requirements.) Parties acknowledge they hold the same policy.

- 15.02 **Failure To Maintain:** In the event any Party fails to maintain the required insurance coverages and a claim is made or suffered, the party failing to provide such coverage shall indemnify and hold harmless the other Party from any and all claims for which the required insurance would have provided coverage.

ARTICLE XVI FORCE MAJEURE

- 16.01 **Event of Force Majeure:** Neither Party shall be liable for any delay or failure in performance of any part of this Agreement to the extent such delay or failure in performance of any part of this Agreement to the extent such delay or failure is the result of a cause outside of the Party's reasonable control (an event of Force Majeure), including but not limited to, the following: fire, flood, explosion, accident, war, strike, embargo, governmental requirement, inability to obtain governmental authorizations or permits, civil or military authority, Act of God, inability to secure necessary materials, labor or transportation, acts or omissions of a common carrier, warehouseman, or other third Party. Any such delay or failure shall excuse the Party claiming a Force Majeure event from performance of its obligations that are directly affected by such Force Majeure condition, until the Force Majeure condition ceases and the term shall be extended by the length of the suspension.

ARTICLE XVII DEFAULT AND TERMINATION

- 17.01 **Customer Default:** If the Customer fails to observe and perform the material terms and provisions of this Agreement, TCL&P may terminate or suspend the Services provided hereunder. In addition, subject to Article XIV, TCL&P may pursue any legal remedies it may have under applicable law or equity.
- 17.02 **TCL&P Default:** If TCL&P fails to observe and perform the material terms and provisions of this Agreement, Customer may terminate this Agreement. In addition,

subject to Article XIV, Customer may pursue any legal remedies it may have under law or equity.

ARTICLE XVIII
GOVERNING LAW

18.01 **Governing Law:** The law of the State of Michigan shall apply to this Agreement.

ARTICLE XIX
VENUE

19.01 **Venue.** All meetings, hearings and actions to resolve the dispute shall be in Grand Traverse County.

ARTICLE XX
ALTERNATIVE DISPUTE RESOLUTION

20.01 **Dispute Resolution:** If any party has a dispute with another regarding the meaning, operation, or enforcement of any provision of this Agreement, the disputing parties agree to meet and confer to negotiate a resolution of the dispute. They further agree as follows:

20.02 **Mediation:** If they are unable to resolve the dispute themselves and before formally instituting any other dispute mechanism, they shall utilize the services of a mutually acceptable neutral mediator, who meets the qualifications of MCR 2.4111, to bring them together in at least one mediation session.

20.03 **Arbitration:** If they are unable to resolve the dispute through mediation, it shall be decided by final and binding arbitration according to the rules and procedures of Arbitration Services of Northern Michigan. Judgment upon the award rendered by the arbitrator may be entered in Circuit Court.

20.04 **Venue:** All meetings, hearings and actions to resolve the dispute shall be in Grand Traverse County.

20.05 **Notice:** Written notice of a claim shall be given to the other party not later than 90 days after the occurrence giving rise to the dispute becomes known or should have become known. Negotiations and mediation shall occur within 60 days after such notice. Unless a longer time is agreed upon, arbitration must be demanded within one hundred and twenty days (120) days after such notice and, if not, the claim is deemed waived. Arbitration must be demanded within this time limit even if negotiation or mediation has not occurred, but the arbitrator must direct the parties to mediation before issuing an award.

ARTICLE XXI
ASSIGNMENT

- 21.01 **Assignment:** Neither Party may assign this Agreement without the written consent of the other Party (which consent shall not be unreasonably conditioned, withheld or delayed); provided however that a Party may assign its rights and obligations hereunder without the consent of the other Party by providing thirty (30) days prior written notice to the other Party when the assignment is to one of the following (i) to any Affiliate ; (ii) pursuant to any sale or transfer of all or substantially all the business; or (iii) pursuant to any financing, merger, or reorganization. Any proposed assignee of Customer must at a minimum meet all TCL&P credit standards then in place. Any assignee of a Party shall be and remain liable for the performance of its obligations under this Agreement. This Agreement and each of the Parties' respective rights and obligations hereunder, shall be binding upon and shall inure to the benefit of the Parties hereto and each of their respective permitted successors and assigns. Any and all increased payments or fees, charges, costs, expenses or regulatory approvals, franchises, permits, orders, consents and rights-of-way either by contract, franchise or some other agreement, and all other rights necessary to be obtained by TCL&P in order to provide Services hereunder, which result from any permitted assignment or transfer of this Agreement by a Party, shall be paid by the assigning Party.
- 21.02 **Security Interests:** Except to the extent such assignment is prohibited by any Authorization relevant to this Agreement, the Parties shall also have the right to assign this Agreement and their respective rights under this Agreement as collateral for indebtedness incurred by such Party in favor of bondholders, a bank or other institutional creditor, if such assignment is part of a grant of a security interest in additional assets of such Party.
- 21.03 **No Prohibition On TCL&P's Business:** Nothing contained in this Article shall be deemed or construed to prohibit TCL&P from selling, transferring, leasing, licensing, granting rights of use or entering into similar agreements or arrangements with other Persons respecting any fibers (other than the Customer Fibers) and conduit constituting part of the TCL&P System.

ARTICLE XXII NOTICES

- 22.01 **Notices:** All notices required or permitted to be given hereunder in writing shall, unless expressly provided otherwise, be in writing, properly addressed; postage pre-paid and delivered by hand, facsimile, certified or registered mail, or overnight courier. A notice will be deemed effective as indicated: (i) if in writing and delivered in person or by overnight courier, on the date it is delivered; (ii) if sent by facsimile transmission, on the date that transmission is received in legible form by a responsible employee of the recipient; or (iii) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its delivery is attempted; unless, in each case, the date of that delivery (or attempted delivery) or that

receipt, as applicable, is not a business day or that communication is delivered (or attempted) or received, as applicable, after the close of business in the location of the recipient on a business day, in which case that communication shall be deemed given and effective on the first following day that is a business day. A Party may change its address by providing notice thereof in accordance with this Section.

22.02 **Addresses:** All notices or other communications which are required or permitted herein shall be addressed as follows:

If to Customer:

City of Traverse City
Attn: City Manager
400 Boardman Avenue
Traverse City, MI 49684
FAX: (231) 922-4476
Tel: (231) 922-4440

If to TCL&P:

TRAVERSE CITY LIGHT & POWER DEPARTMENT
1131 Hastings Street
Traverse City, MI 49686
Attn: Executive Director
Fax: (231) 922-4638
Tel: (231) 932-4559

* * * * *

IN WITNESS WHEREOF, TCL&P and Customer have executed this Agreement as of the date first above written.

TRAVERSE CITY LIGHT & POWER DEPARTMENT:

By: _____
Linda Johnson, Chairperson

By: _____
Edward E. Rice, Secretary and Executive Director

CUSTOMER :

Christopher M. Bzdok
Mayor, City of Traverse City

Debbra A. Curtiss
Clerk, City of Traverse City

Approved as to substance:

R. Ben Bifoss
Manager, City of Traverse City

Approved as to form:

Karrie A. Zeits
Attorney, City of Traverse City

Approved as to form:

W. Peter Doren
Light & Power General Counsel

THE CITY OF TRAVERSE CITY

EXHIBIT 1

<u>Fiber Count</u>	<u>Site</u>	<u>Address</u>
2	Governmental Center	400 Boardman Ave.**
2	Department of Public Services	625 Woodmere Ave.

*(** for the purposes of this agreement the governmental center will not be considered a site for billing purposes until it becomes part of a city loop configuration.)*

2	Larry C. Hardy Parking Deck	303 E. State St.***
2	Old Town Parking Deck	Lake St.

*(*** for the purposes of this agreement the above parking decks will be considered 1 site for billing purposes until the stand alone fiber strand connecting the two parking decks are connected to theTCL&P backbone fiber optic system; the decision to connect to the system shall be in the sole discretion of the City.)*

Possible future Sites:

Fire Station #1	510 W Front St.
Fire Station #2	1313 E. Eighth St.
Fire Station #3	3425 Wright Drive (airport)
Governmental Center	400 Boardman Ave.
Water Treatment Plant	2010 Eastern Ave.
Wastewater Treatment Plant	606 Hannah Ave.
Water and Sewer Dist.	507 Hannah Ave.
LaFranier Water Tower	LaFranier Rd.
Wayne Hill Water Tower	Wayne Hill
Front Street Sewer Pump Station	Front Street
DDA Office	303 E. State St.
Clinch Park Marina	Marina Drive
Senior Center	801 E. Front St.
Hickory Hills Ski Area	2000 Randolph
Oakwood Cemetery	TBD
City Opera House	112 ½ E. Front St.

Note: *Future sites and the idea of a city loop are conceptual plans. Each site will be connected only as the need arises and as it becomes cost effective to do so. Future site connections are at the sole discretion of the city.*

Exhibit 1
System With Laterals

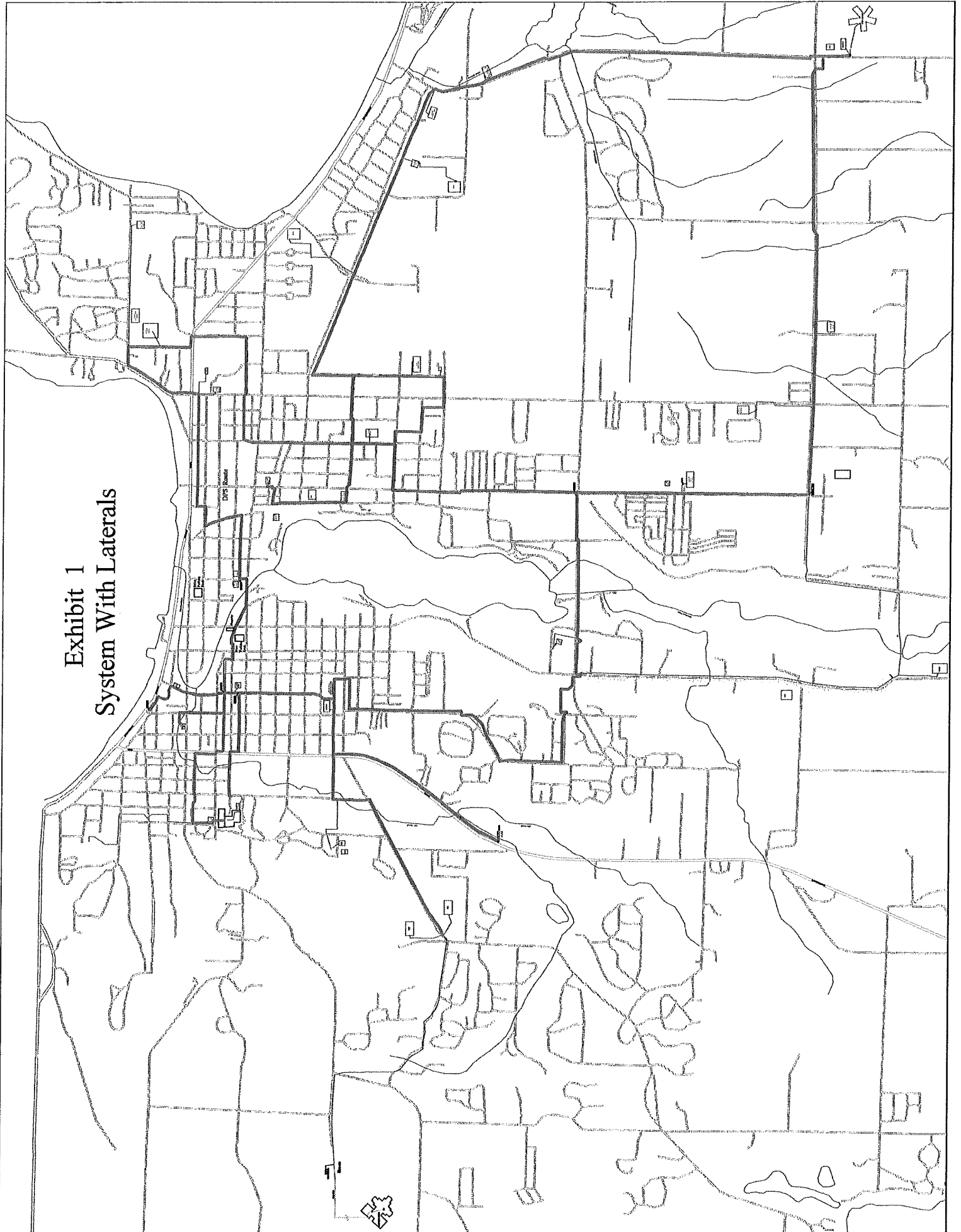


Exhibit 1
DPS Route

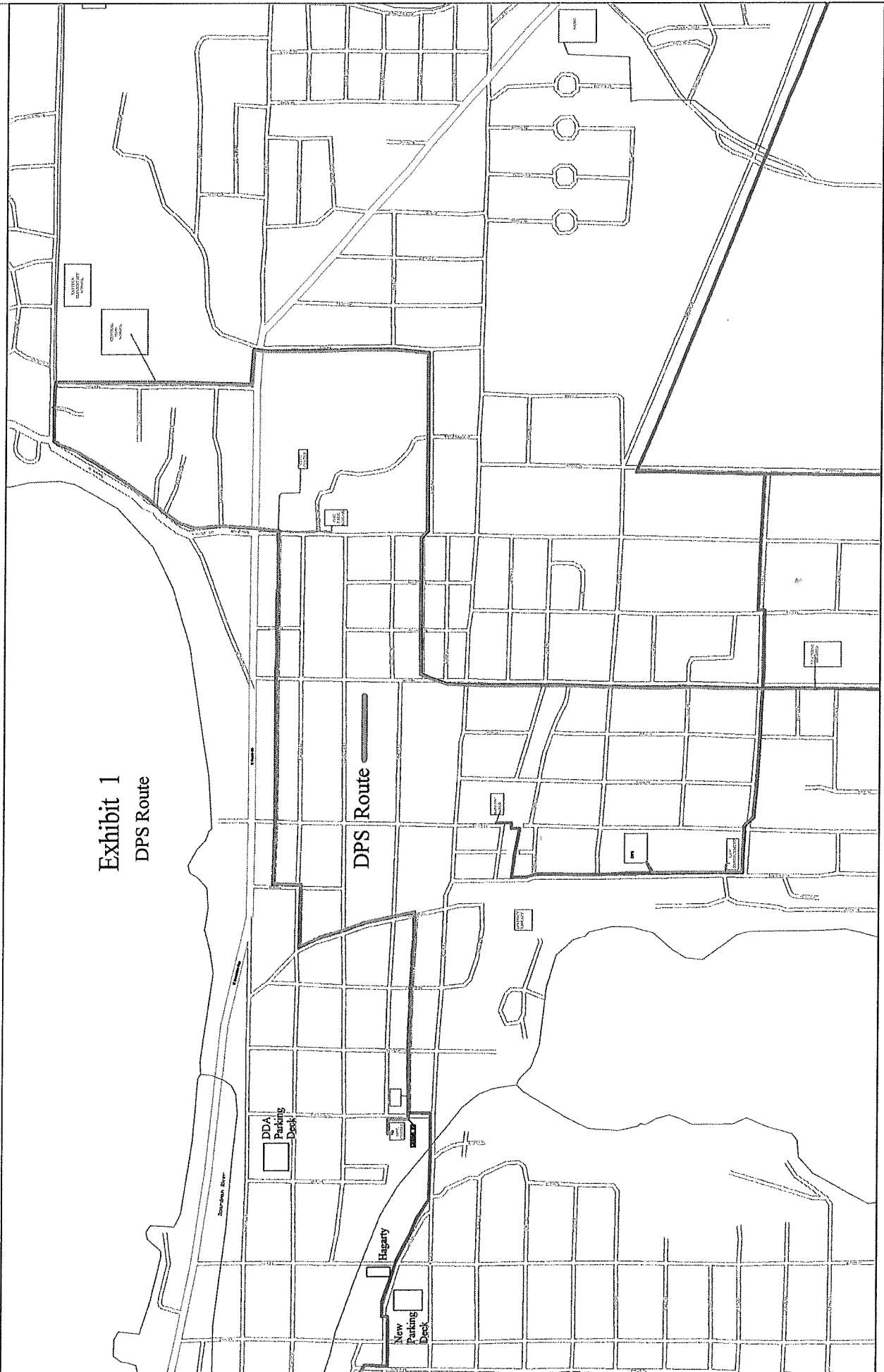
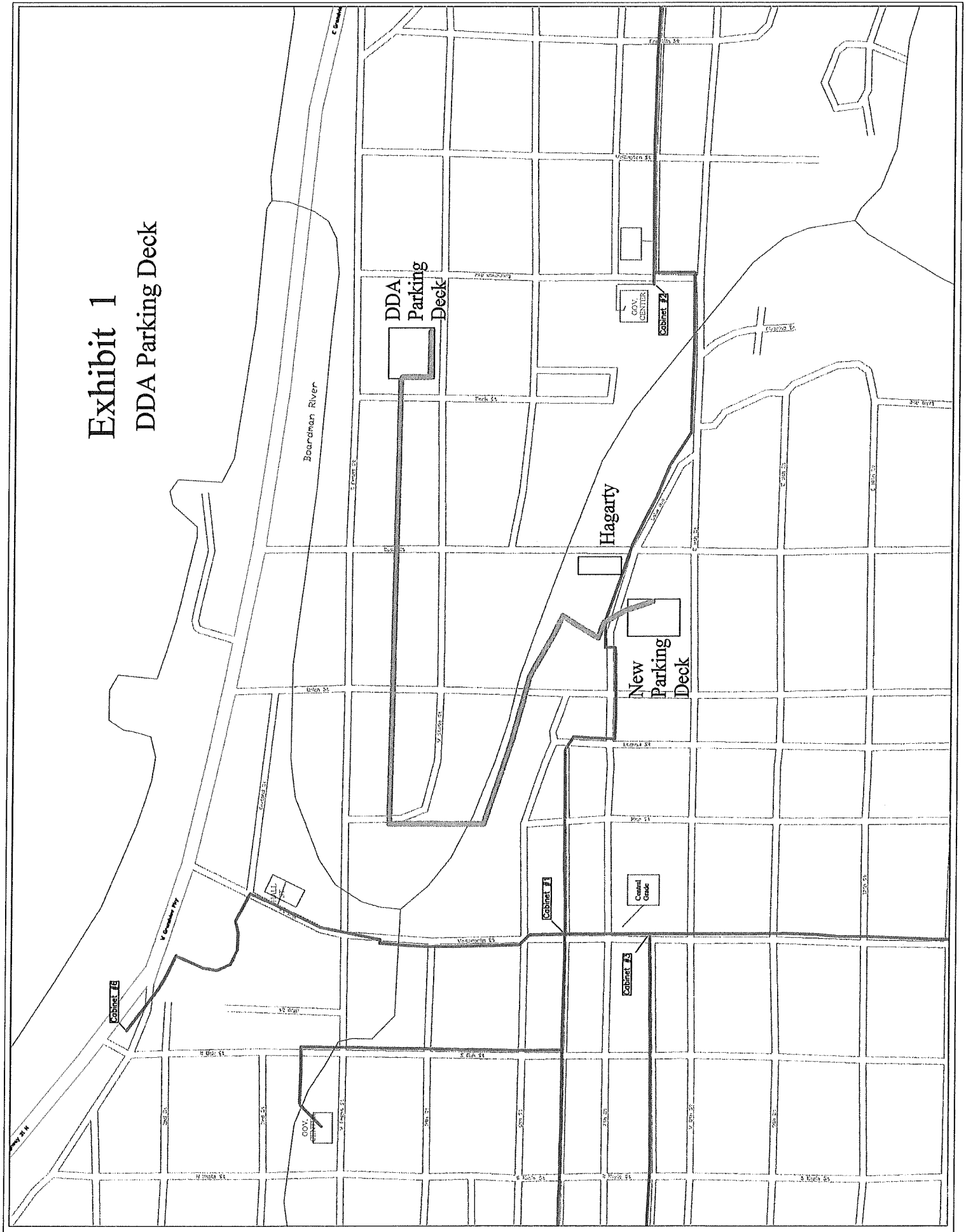


Exhibit 1

DDA Parking Deck



CITY OF TRAVERSE CITY

EXHIBIT 2

ERU FEE AND RECURRING CHARGE

I. Fees.

A. ERU Fee.

- (1) Years 1-3 – Initial Term
 - (a) \$235 per month (\$2,820 per year) per Site.
 - (b) The monthly ERU Fee shall commence for each Site as of the month of the Acceptance Date for that Site.
 - (c) Because different sites may be connected at different times during the Term, the initial term ending date for all sites shall be the initial term ending date for the first site.

B. Recurring Charge Included in the ERU Fee.

II. **Renewal Escalation.** The ERU Fee and/or the Recurring Charge may be increased at the beginning of a Renewal Term by the increase, if any, in the Consumer Price Index - All Urban Consumers (CPI-U, U.S. City Average), published by the United States Department of Labor, Bureau of Labor Statistics (1982-84 = 100), for the original twelve (12) month period of the prior term. In the event such index shall cease to be computed or published, the parties shall designate a successor index to be used in determining any increase to the ERU Fee or the Recurring Charge.

III. **Invoices.** The ERU Fee and/or Recurring Charge shall be invoiced in advance by TCL&P monthly during the Term, and any Renewal Term thereafter, and shall be paid within forty-five (45) days after the date of the invoice ("Due Date"). Any sums not paid on the Due Date shall bear interest at an annualized rate of twelve percent (12%). In the event Customer disputes all or a portion of an invoice, Customer shall notify TCL&P in writing of the nature and amount of the dispute on or before the Due Date and shall pay the undisputed portion of the invoice on or before the Due Date. The Parties will work together in good faith to resolve properly noticed disputes. In addition to any other rights and remedies under this Agreement, failure to make any payment when due hereunder shall be a default.

CITY OF TRAVERSE CITY


EXHIBIT 3

Acceptance Testing Procedure

Acceptance of the fiber system is based upon the Power (Insertion) Loss Testing on the fiber system on a Span-by-Span basis. TCL&P verifies that all fibers have one-to-one continuity on the new cable both at the fiber level and the pigtail level. In addition, TCL&P visually inspects fiber color codes and buffer tube color at each end of a Span. Fiber Testing will be from the final TCL&P Demarcation points. A report of the test data for proof of compliance of each fiber on a span by span basis will be supplied to Customer.



**TRAVERSE CITY
LIGHT & POWER**

To: Light & Power Board
From: Edward E. Rice, Executive Director 
Date: January 22, 2010
Subject: Closed Session – Real Property Purchase

Pursuant to the Open Meetings Act, I request a closed hearing of the Light & Power Board to consider the purchase of real property – non generation related.

A Roll Call vote is required with four affirmative votes.

The following recommended motion would be appropriate to do so:

**MOVE BY _____, SECONDED BY _____,
THAT THE TRAVERSE CITY LIGHT & POWER BOARD GO INTO CLOSED
SESSION IMMEDIATELY AFTER PUBLIC COMMENT TO CONSIDER THE
PURCHASE OF REAL PROPERTY.**