

SUBSURFACE LEASE
RW File # 7133

THIS LEASE (referred to herein as "Lease" or "Subsurface Lease") made and entered into this ____ day of _____, 2011, by and between the City of Portland, a municipal corporation of the State of Oregon (hereinafter referred to as the "City"), and **State of Oregon, acting by and through the State Board of Higher Education on behalf of Portland State University**, (hereinafter referred to as the "Lessee").

WITNESSETH

WHEREAS, Lessee desires to lease subsurface space under the intersection of SW Montgomery Street and SW 10th Avenue to construct and maintain a 9.00 foot high X 10.00 foot wide utility tunnel which will support electrical and telecommunications systems operated by Lessee and will connect segments of privately owned tunnels to be constructed under Application No. 2009-138508;

WHEREAS, Lessee has made significant contributions to public improvements being made in the vicinity of this Lease;

WHEREAS, the City Engineer has reviewed the proposed encroachment into the public right-of-way and, subject to Lessee complying with certain conditions provided for herein, has determined it to be consistent with approval criteria and policies as outlined in the City Policy "Encroachments in the Public Right-of-Way," adopted in 1982;

WHEREAS, the City Council has determined the proposed encroachment into the public right-of-way subsurface space beneath the street will not be needed for public use within the period of this Lease and the subsurface facilities will not unreasonably interfere with the public use and utility use of the street area; and, will give the best return to the City of use of such area.

NOW THEREFORE IT IS MUTUALLY AGREED AS FOLLOWS:

1. Lease. The City does hereby lease unto Lessee, its successors and assigns, the subsurface space as depicted in Exhibit "A" attached hereto and incorporated herein by reference (hereinafter referred to as the "Subsurface Space"). The surface area above the Subsurface Space contains approximately 1,317 square feet, more or less. The Subsurface Space is located in the southwest corner of the intersection of SW Montgomery and SW 10th, in the City of Portland, Oregon.
2. Authority. This Subsurface Lease is executed pursuant to the authority granted by Ordinance No. _____, adopted by the City Council of the City of Portland, Oregon, on the ____ day of _____, 20____. The City Council, in accordance with ORS 271.430, has notified the owners of the property abutting the street property and has given them an opportunity to be heard with respect to this Subsurface Lease, and has determined that the use of the Subsurface Space will not unreasonably interfere with public use and

utility use of the city streets and sidewalks, as provided by law. It is understood that this Subsurface Lease shall not affect the prior dedication or grant of the street property for street and sidewalk purposes.

3. As-Built Survey. Within ninety (90) days after the completion of the tunnel structure, Lessee shall cause the architect or engineer of the Subsurface Space to prepare "as-built" drawings to determine the actual square footage of the surface area above the Subsurface Space and the actual City of Portland datum elevations of the Subsurface Space (the "as-built" drawings"). Lessee will provide a copy of said "as-built" drawings to the City, with the as-built survey to be prepaid by a qualified professional.
4. Rent.
 - A. The "Initial Rent" for the Subsurface Space is \$1,000 per year, based upon estimated Lease area of 1,317 surface square feet. The date of construction for the tunnel is the rent commencement date.
 - B. Lessee shall pay to the City, in advance on or before the tenth (10th) day of January of each calendar year during the term of this Subsurface Lease, annual rent in an amount equal to the Initial Rent then in effect as provided in Section 4.A. hereof. If, during the Initial Term (as defined in Section 6 below) of this Subsurface Lease or any renewal term, the period in which annual rent is due is less than a calendar year, the amount due shall be prorated based upon a calendar year containing 360 days.
 - C. All Rent to be paid by Lessee to City shall be in lawful money of the United States of America and shall be paid without deduction or offset at such place or places as may be designated from time to time by City. While City intends to invoice Lessee annually, delayed invoicing does not relieve Lessee of its obligation to pay rent on time.
 - D. No payment by Lessee or receipt by City of a lesser amount than any installment or payment of rent or other charges or fees shall be deemed to be other than on account of the amount due, and no endorsement or statement on any check or payment of rent or other charges or fees shall be deemed an accord and satisfaction. City may accept such check or payment without prejudice to City's right to recover the balance of such installment or payment, or pursue any other remedies available to City. Payments received shall be credited to the oldest outstanding amount due.
 - E. In addition to all of the remedies provided by this lease, if any rent or other charge required by this lease is not received by City within ten (10) days after it is due, Lessee shall pay a late fee of \$100.00. Lessee shall pay any late charges within forty-five (45) days upon City's request. The imposition by City and/or the payment by Lessee of any late charges shall not waive or cure Lessee's default hereunder. Failure to impose a late charge on one occasion does not affect a waiver of City's right to impose a late charge on subsequent delinquent payments.
 - F. All amounts not paid by the Lessee when due or demanded shall bear interest at the rate of one percent (1%) per month. The interest rate of one percent (1%) on overdue accounts is subject to periodic adjustment in writing to reflect City's then current interest rate charged on overdue accounts.
 - G. In the event that any check, draft, or other instrument of payment given by Lessee is dishonored for any reason, Lessee agrees to pay City the sum of \$100, in addition to any

late fee which will be due within 45 days upon City's request. City may, at its option, require Lessee to pay all future Rent by cashier's checks or other methods.

- H. In the event that the Subsurface Space becomes unavailable to Lessee under this provision for thirty consecutive days, or more, through no fault of Lessee, then rent shall be abated for that period time and said amount shall be credited to rents due the following year, except that rent abated for the final year of the lease shall be refunded to Lessee no later than sixty (60) days after the lease has terminated.

5. Rent Adjustment.

- A. Commencing at the beginning of the sixth (6th) full calendar year following the rent commencement date and thereafter on the last day of each succeeding five (5) year period throughout the remainder of the Initial Term and any renewal term (hereinafter "Rent Adjustment Date"), rent shall be adjusted to equal the rent at the beginning of the previous period for which rents were fixed, increased by any percentage increase in the most recently available CPI as of such Rent Adjustment Date over the CPI as of the beginning of the previous period for which rents were fixed. For example, if the CPI as of the date of this Subsurface Lease were 300.2 and the CPI as of the fifth anniversary of the rent commencement date were 321.2, annual rent for the succeeding five-year period would be determined by multiplying the Initial Rent by 1.07. For purposes of this Section 5, the term "CPI" means the Consumer Price Index for All Urban Consumers (1982-84 equal to 100), Portland, Oregon for All Items, or a comparable Index published by the United States Bureau of Labor Statistics if such Consumer Price Index be discontinued.
- B. At no time during the Initial Term or any renewal term, shall a rent adjustment result in an annual rent that is less than the annual rent for the previous period for which rents were fixed.

6. Term.

- A. The "Initial Term" shall commence upon the date of construction of the tunnel and shall expire 30 years after said date, unless extended pursuant to Section 7 below.
- B. Notwithstanding anything to the contrary herein, this Subsurface Lease will terminate:
- 1) Five years from the effective date if construction of the tunnel has not commenced by that date
 - 2) One hundred eighty (180) days after the improvements built or caused to be built by Lessee and the street property are substantially destroyed, unless prior to expiration of said 180 day period Lessee has given notice to the City of its intention to rebuild, or cause to be rebuilt, the improvements. If Lessee gives the City its notice within the 180 day period then this Subsurface Lease shall not terminate and thereafter Lessee shall commence, within 120 days from the date of such notice, to rebuild the improvements and shall diligently pursue the same unto completion. Except as otherwise provided in this Subsurface Lease, if Lessee fails to commence to rebuild or cause to be rebuilt the improvements within the 120 day period or fails to diligently pursue the same, City may notify Lessee that it is in default of such obligations as provided for under Section 17 of this Subsurface Lease.
- C. When used in this Subsurface Lease, "term" shall mean the Initial Term of this Subsurface Lease or the Initial Term of this Subsurface Lease as renewed pursuant to

Section 7.

7. Renewal.

- a) Lessee shall have the option to renew this Subsurface Lease for two successive terms of thirty (30) years each commencing on the expiration of the original term. Said renewals will require written request by Lessee, as provided for below, which will not be unreasonably denied by City. If a renewal request by Lessee is denied, City shall explain in writing the reasons for said denial.
- b) In order to seek renewal, Lessee shall be in full compliance with the terms and conditions of the lease at the time the option is exercised. Should Lessee elect to renew the term of this lease, it shall give to City its written notice of such election not later than twelve (12) months prior to the expiration of the original term. Within sixty (60) days of receipt of Lessee's written notice of election to renew lease, City shall contact Lessee and arrange a suitable time and place to negotiate negotiable changes in the terms and conditions of the lease for the renewal term.
- c) Any negotiated changes in the terms and conditions of this lease shall be in writing and, unless otherwise agreed, shall become effective on the first day of the renewal term. In the event City and Lessee cannot agree on other negotiable changes, if any, in the terms and conditions of this lease within one hundred twenty (120) days from the expiration of the original term or subsequent term thereof, this option to renew shall expire and the lease shall terminate as required by the original lease or any amendments.
- d) **Availability of Funds Clause; Non-appropriations Clause:**
Lessee certifies that sufficient funds are available to finance Lessee's obligations under this Agreement within its current biennial appropriation or expenditure limitation, provided, however, that continuation of this Agreement or any extension, after the end of the fiscal period in which it is written, is contingent upon a new appropriation or limitation for each succeeding fiscal period for the purpose of this Agreement. In the event of such Non-Appropriation Lessee will notify City of its intent to terminate this Agreement following the notice and cure rights provided for in Section 19.

- 8. Net Lease. It is the intention and purpose of the City and Lessee that this Subsurface Lease shall be a "net lease" to City, all cost or expense of whatever character or kind, general and special, ordinary and extraordinary, foreseen and unforeseen and of every kind and nature whatsoever that may be necessary in or about the operation of the Subsurface Space and Lessee's authorized use thereof during the entire term, or its extension(s), to be paid by Lessee including but not limited to taxes, utilities, security insurance, and/or property assessments, if applicable. All provisions of this Subsurface Lease relating to expenses are to be construed in light of such intention and purpose to construe this Subsurface Lease as a "net lease".
- 9. Permitted Uses. Lessee is authorized to use the Subsurface Space for a 9.00 foot high x 10 foot wide utility tunnel which will support electrical and telecommunications systems operated by and for Lessee's private use and will connect segments of privately owned tunnels to be constructed under Application No. 2009-138508; ("Permitted Uses"). In the event that at Lessee's request the City Council shall approve use of the Subsurface Space for additional purposes in the manner hereinafter provided, the rent payable by Lessee shall be

renegotiated between the Lessee and the City to a reasonable rate in accordance with the then current rental rates for comparable facilities and uses.

10. Encroachment Approval Conditions Notwithstanding terms and conditions to the contrary herein, Lessee will comply with the requirements of the City Engineer, as provided for in that certain City Engineer's Report accompanying the encroachment permit for the proposed tunnel, dated December 17, 2009.
11. Use, Nuisance, Waste, Hazard. Lessee shall use Subsurface Space for Permitted Uses and no other use whatsoever without the prior written approval of the City, which consent shall not be unreasonably withheld or delayed. Lessee shall at all times keep Subsurface Space in a clean and sanitary condition to the reasonable satisfaction of the City and shall comply with any laws, ordinances, and regulations relating to use of the Subsurface Space. Lessee shall refrain from any use which is unlawful or interferes with or obstructs the rights of the City or other owners, users, or occupants of nearby surface and/or subsurface space. Lessee shall not create a nuisance or damage the reputation of the Subsurface Space, commit or suffer any strip or waste of the Subsurface Space or create or permit to be created any condition which would constitute a fire hazard, impair the strength or durability of the parking structure, or be dangerous to persons or property. Lessee shall not sell or consume or permit the sale or consumption of alcohol or illegal drugs of any kind on the Subsurface Space. No use may be made of, on, or from the Subsurface Space relating to the handling, storage, disposal, transportation, or discharge of hazardous or toxic wastes, substances, pollutants, or contaminants as those terms are defined by Federal, State, or local law or regulation over time, provided however, nothing herein shall prohibit the use and parking of vehicles in the Subsurface Space for the Permitted Uses. City acknowledges that vehicles in the Subsurface Space for the Permitted Uses may contain petroleum products and may have incidental leakage of such petroleum products, and such shall not be a violation of this Lease. Lessee shall, however, be responsible for appropriate clean up of any such leakage. Lessee shall maintain the Subsurface Space in compliance with all applicable laws and shall be responsible for making any notification or report concerning the Subsurface Space to the appropriate government authority. In the event of violation of any of the above conditions, the Lessee shall be solely responsible for all costs of compliance, removal or restoration, and at the sole discretion of the City, this lease may be terminated, following the notice and cure rights provided in Section 17.
12. Acknowledgments and Covenants of the City. The City hereby acknowledges and covenants that Lessee shall at all times during the Subsurface Lease term and the optional renewal periods, if exercised, peaceably and quietly enjoy the Subsurface Space without any disturbance from the City, except only such disturbance as shall be reasonably required for installation, maintenance and repair of the surface of public street areas adjacent to and above the Subsurface Space, or any City facilities or utilities, such as water mains, sewer lines, cable conduit and the like within or adjacent to the Subsurface Space.

13. Acknowledgments and Covenants of Lessee. Lessee hereby acknowledges and covenants that:

- A. Each individual executing this Subsurface Lease on behalf of the Lessee is duly authorized to execute and deliver this Subsurface Lease and Lessee warrants and represents that this Subsurface Lease is binding on Lessee.
- B. Lessee has examined the Subsurface Area and accepts it in "as is" condition. No representations or warranties as to the condition of the said area have been made by City or its officers, agents or employees. City shall have no liability to Lessee for any damage or injury caused by the condition of the Subsurface Area.
- C. Lessee accepts the Subsurface Area subject to any and all valid interests of record, including, but not limited to existing permits, licenses, leases, easements, franchise agreements, railroad facilities, pipelines, telephone, telegraph, communication, power and signal lines or any other similar facilities.
- D. Lessee shall cause to be performed, without expense to City, all utility abandonment or relocation, including, but not limited to, storm and sanitary sewer facilities, water mains and services, street lights, traffic signals and fire hydrants, electrical, gas, telephone or other utilities necessitated by Lessee's construction of facilities in the Subsurface Space and shall cooperate with the City in the incorporation, at no expense to the City, of traffic control and signing systems in the construction of the facilities. Plans and specifications for the relocation of City owned utilities shall be subject to the reasonable approval of the City and if the utility facilities are within the Lessee's improvements constructed in the Subsurface Space, Lessee will make arrangements reasonably acceptable to all utilities to provide them access for maintenance of said relocated utilities after the completion of construction, including twenty-four (24) hour access to such relocated utilities for repair and maintenance purposes. In the event that City cannot cause any private utility or utilities to permanently relocate at the utilities' own expense, Lessee shall indemnify and hold harmless City for all expenses reasonably incurred by it in connection with said relocation, and will pay on an ongoing basis for all expenses of said relocation work. In the event that a judgment is entered against City for reimbursement of costs incurred by private utilities in the relocation or abandonment of private utility facilities, Lessee shall indemnify and hold harmless City for the amount of such judgment, provided, however, that City shall, prior to responding to such claim, notify Lessee of any such claim made against City for reimbursement of relocation costs by a private utility, and Lessee shall have the option of paying such claim or paying City's reasonable costs of contesting such Claim, including reasonable costs of appeal. Lessee covenants and agrees to pay for any temporary relocation or improvements required to accommodate existing private utility networks necessitated by the project. Lessee covenants and agrees to pay for all relocation, abandonment or improvement costs of all public utility networks to the extent necessitated by the project.
- E. The construction of facilities in the Subsurface Space shall be subject to such City ordinances and license and permit requirements as are generally applicable to such construction. In particular, all structural plans, materials to be used, and methods of installation relating to said facilities shall be subject to such approvals of the City Engineer, Environmental Services Engineer, water engineer, traffic engineer, building bureau, and fire marshal as would ordinarily apply to similar construction. Lessee shall

provide for vehicular and pedestrian traffic during construction in a manner approved by the City Engineer and traffic engineer.

- F. Lessee shall release and hold harmless the City and its officers, agents and employees from and shall assume all risks of damage to the subsurface structures constructed by Lessee or to any personal property located in said structures resulting directly or indirectly from the failure of water lines or sewers or other utilities occurring during or resulting from the construction, reconstruction or maintenance of the street surface above or adjacent to the Subsurface Space, or any utilities in the Subsurface Space, except for liability arising solely out of the acts or omissions of City, its officers, agents and employees. This Section is not intended to increase the City's liability beyond the maximum limits contained in the Oregon Tort Claims Act, ORS 30.260 to 30.300, as presently in effect or hereafter modified, and nothing in this Section is intended to limit any recourse Lessee may have against third parties causing the damage to such subsurface structures or personal property therein.
- G. When used in this Subsurface Lease, "private utilities" shall include, but not be limited to, natural gas, electrical, steamlines, chilled water systems from any district cooling facility, telephone and television cable facilities.
- H. When used in this Subsurface Lease, "public utilities" shall include, but not be limited to, water mains and services, storm and sanitary sewers, light rail facilities, street lights, traffic signals, and fire hydrants.
- I. City shall have the right to inspect the Subsurface Space at any time, upon 24 hours notice to Lessee, for the purpose of examining the condition thereof, for installation, maintenance, repair or alteration of any fixture, utility, facility, or thing therein or thereupon, or any other lawful purpose or to verify the safety of the structures therein and the uses to which the Subsurface Space is being put. The City may enter into or repair the Subsurface Space without notice in case of emergency but shall promptly notify Lessee of such entry.

14. Indemnity.

- A. To the extent permitted by Article XI, Section 7 or the Oregon Constitution, and subject to the limits of the Oregon Tort Claims Act, ORS 30.260 through 30.300, Lessee shall indemnify, defend and hold harmless City, its officers, agents and employees from any and all liability, damage, expenses, attorney's fees, causes of actions, suits, claims or judgments, arising out of or connected with (1) use, occupancy, management, or control of the Subsurface Area, (2) any failure of Lessee to comply with the terms of this lease or any violation of law or ordinance and (3) the acts or omission of Lessee, its agents, officers, directors or employees, provided, however that Lessee shall not be liable for claims caused by the sole negligence of City, its officers, agents or employees. Subject to the City providing Lessee written notice of the claim, demand, action or suit, Lessee shall, at its own cost and expense, defend any and all claims, demands, actions or suits which may be brought against Lessee, or City or its' officers, agents or employees, either alone or in conjunction with others upon any such above mentioned cause or claim, and shall satisfy, pay, and discharge any and all judgments that may be recovered against Lessee, or City or its' officers, agents, and employees, in any such action or actions in which they may be party defendants.
- B. Lessee shall give City prompt written notice in case of casualty or accident on the Subsurface Area. Lessee, as a material part of the consideration to City, hereby assumes all risk of damage to property or injury to persons, in, upon or about the Subsurface Area from any cause other than City's sole negligence,
- C. City and its officers, agents, and employees shall not be liable for any latent defect in the Subsurface Area. In addition to the indemnity provided above, Lessee agrees to indemnify, defend and hold harmless City, and its' officers, agents and employees, from and against all damages, costs, liabilities, and expenses caused by, arising out of, or in connection with, the use, generation, release, manufacture, refining, handling, processing, storage, transportation, or disposal of Hazardous Substances as defined in by ORS 465.200(16)(2003 Ed) or as it may be amended including asbestos. Damages, costs, liabilities and expenses shall include any amounts claimed to be owed by any regulatory or administrative agency.
- D. Insurance. Lessee shall maintain insurance, or a program of self insurance acceptable to City, meeting the standards set forth in Exhibit B which is attached to this Subsurface Lease. Lessee shall furnish to City a certificate of insurance or self insurance for the coverage and limits set forth in Exhibit B which is to be in force and applicable for the duration of the Subsurface Lease.

15. Maintenance, Taxes and Assessments.

- A. Lessee agrees to maintain the facilities, other than relocated utilities, constructed by it in the Subsurface Space at its own expense and shall be responsible for proper control of drainage and for waterproofing of such facilities. Lessee agrees to restore, to the reasonable satisfaction of the City Engineer, any portion of the right of way which may be disturbed during construction of facilities in the Subsurface Space and agrees to maintain the surface of the right of way against settlement caused by the construction or existence of Lessee's subsurface facilities, provided said settlement is not caused by use of the surface of said right of way in excess of the load capability shown on Lessee's final

plans and specifications approved by the Lessee and the City. If Lessee's use of the Subsurface Space causes an immediate hazard in the street area, Lessee must make immediate repairs and if such repairs are not made in a responsive manner as determined by the City Engineer, then the City, upon providing Lessee with written notice of its finding and reasonable opportunity to repair, may cause such repairs to be made and bill Lessee for such cost. Failure to make payment within 90 days of billing shall constitute default in accordance with Section 17.

- B. Lessee agrees to pay any taxes and assessments (subject to applicable exemptions) that are or may be levied upon the Subsurface Space and the facilities other than relocated utilities constructed therein. If Lessee objects in good faith to the validity or amount of any tax or assessment that is or may be levied upon the Subsurface Space, Lessee, at Lessee's sole expense, may contest the validity or amount of the tax or assessments levied upon the Subsurface Space provided that City's interest in the Subsurface Space is not jeopardized.

16. Default.

- A. The following shall be events of default:

- 1) Lessee fails (i) to pay rent as required pursuant to Section 4 hereof, (ii) to maintain insurance as required pursuant to Section 14 hereof, (iii) to maintain the facilities constructed in the Subsurface Space as required pursuant to Section 10 hereof, (iv) to comply with the use limitations provided for in Section 9; (v) to rebuild the improvements in the Subsurface Space as provided for in Section 6.B. hereof, or (vi) to pay any taxes and assessments levied upon the Subsurface Space and the facilities constructed therein or to reimburse the City for repairs as required pursuant to Section 15 hereof.
- 2) Lessee making an assignment for the benefit of creditors, filing a petition in bankruptcy, petitioning or applying to any tribunal for the appointment of a custodian, receiver or any trustee for it or a substantial part of its assets, or commencing any proceedings under any bankruptcy, reorganization, arrangement, dissolution or liquidation law or statute of any jurisdiction, whether now or hereafter in effect; or Lessee by any act or omission consents to the approval of or acquiescence in any such petition, application or proceeding or order for relief or the appointment of a custodian, receiver or any trustee for it or any substantial part of any of its properties, or suffering any such custodianship, receivership or trusteeship to continue undischarged for a period of sixty (60) days or more.

- B. In the event that an event of default continues for more than 90 days after written notice specifying the nature thereof (except for failure under A.1.(iv) above, in which case such failure need only continue for sixty (60) days after written notice specifying the nature thereof and except for failure under A.1.(ii) above, in which case failure need only continue for twenty (20) days after written notice specifying the nature thereof), such failure shall constitute an "Event of Lessee's Default" hereunder; provided, however, that if such failure be of such a nature as cannot be completely remedied within the applicable notice period, as the case may be, no default shall occur so long as Lessee begins correction of the default within the applicable notice period and thereafter proceeds with reasonable diligence and in good faith to remedy the failure as soon as practicable.

17. Remedies for Default.

- A. In the event of failure on the part of Lessee described in Section 16.A., which failure has continued for more than 90, 60 or 20 days, as specified in this agreement, after written notice specifying the nature thereof or, if such failure be of such nature as cannot be completely remedied within said 90-, 60- or 20-day period, and Lessee has not begun correction of the default or is not diligently pursuing such cure to completion within said 90-, 60- or 20-day period, as the case may be, and subject to the rights of the Interested Parties as set forth herein, City may, upon 60 days' written notice, terminate this Lease. During the pendency of any such default hereunder, Lessee shall continue to perform its duties and obligations hereunder, including, without limitation, its obligation to maintain the Subsurface Space, and, in the event that Lessee or any Interested Parties shall fail to perform such duties and obligations, City may, but shall not be obligated to perform any or all of such duties or obligations, at Lessee's expense.
- B. If Lessee or any Interested Party shall fail to pay required insurance premiums when due and City deems it necessary, City may, at any time prior to or after actual default, after ten days' written notice to Lessee and any Interested Party, purchase insurance coverage with the limits required by this Lease, or any lesser limits determined by the City Engineer in his or her discretion to provide City and its officers, agents, and employees adequate coverage, at Lessee's expense. If, for any reason, City does purchase insurance coverage as provided in this Section, Lessee shall reimburse the City for the cost of the insurance premiums. Lessee shall submit reimbursement payments to City within thirty (30) days of receiving an invoice for the premiums from City.
- C. City shall have such other remedies, not inconsistent with the provisions of this Lease, as may be available to City at law or in equity.
- D. In the event of termination of the Subsurface Lease with Lessee, the City will negotiate in good faith with the Owners for the purposes of agreeing on a replacement lease for the Subsurface Lease. During such period of negotiation (not to exceed 180 days), City agrees that it shall not interfere with access to the Subsurface Space necessary for the structural elements of the Blocks.
- E. In the event the City shall default in the performance of any of its obligations under this Subsurface Lease and City shall fail to cure the default within thirty (30) days after receiving written notice from Lessee, Lessee shall be entitled to seek remedies, not inconsistent with the provisions of this Subsurface Lease, as may be available to Lessee at law or in equity.

18. Surrender.

- A. Upon the termination of this Subsurface Lease whether by expiration of the term hereof, or by an Event of Lessee's Default, Lessee shall surrender and deliver up possession to the City of the Subsurface Space and the improvements constructed therein in a safe and well maintained condition and free and clear of any liens and encumbrances.
- B. In the event that the subsurface lease is not kept in force per the requirements set forth herein or if the subsurface improvements are removed or abandoned, the subsurface improvements in the Subsurface Area shall be removed by Lessee to the satisfaction of the City Engineer. Any work to accomplish the restoration of the right-of-way (surface or sub-surface) shall first be approved by the office of the City Engineer. The Lessee shall submit plans for the work to the Bureau of Transportation; shall obtain a permit and pay

all permit and inspection fees prior to the start of the restoration work. A plan and schedule for restoration work shall be submitted by the Lessee to the Bureau of Transportation not less than 10 days once the notice to surrender the Lease is given to the Bureau of Transportation. All construction restoration work shall be completed to the satisfaction of the City Engineer no later than 90 days from the notice to surrender during which time the street shall remain open to the public for normal transportation activity.

19. Assignment; Subletting. Lessee may assign its interest in this Lease as follows:

- A. Except as provided in Sections 12 (Acknowledgements and Covenants of the City), Lessee shall not assign or mortgage this lease or any interest herein and shall not sublet the Premises or any part thereof, or any right or privilege pertinent thereto, and shall not sell or otherwise transfer any ownership interest in any corporate Lessee, or permit any other person (the agents, employees and invitees of Lessee excepted) to occupy or use the Premises or any portion thereof, without first obtaining the written consent of City, which City will not unreasonably withhold, condition, or delay. Consent by City to one assignment, subletting, transfer, occupation or use by another person shall not be deemed to be consent to any subsequent assignment, subletting, transfer, occupation or use by another person.
- B. Except as to full assignments or transfers, City consent to an assignment, sublet, transfer, occupation or use shall not release the original named Lessee from liability for the continued performance of the terms and provisions on the part of Lessee to be kept and performed, unless City specifically and in writing releases the original named Lessee from liability.
- C. Any assignment, subletting, transferring, occupation or use without the prior written consent of City shall be void and shall, at the option of City, terminate this lease. This lease shall not, nor shall interest herein, be assignable, as to the interest of Lessee, by operation of law, without the prior written consent of City.
- D. City shall not unreasonably withhold, condition, or delay its consent to any assignment, subletting, transfer, occupation or use provided the rent paid by the assignee or sub lessee is not less than the rent required by this lease and the proposed Lessee is compatible with City's normal standards for the Premises. If Lessee proposes a subletting, assignment, transfer, occupation or use, City shall have the option of terminating this lease and dealing directly with the proposed sub lessee or assignee, or any third party.
- E. If an assignment, subletting, transfer, occupation or use is permitted, the net value of any rent received by Lessee as a result of such transaction shall be paid to City promptly following its receipt by Lessee.
- F. The covenants and conditions herein contained, subject to the sections as to assignment, apply to and bind the heirs, successors, executors, administrators and assigns of the parties.

20. Liens. Lessee shall keep the Subsurface Space free from all liens, including mechanics liens, arising from any act or omission of Lessee or those claiming under Lessee. Lessee shall pay as due all claims for work done, for services rendered or material furnished to the Premises at its request. If Lessee fails to pay any claims or to discharge any lien, City may do so and collect all costs of discharge. Such action by City shall not constitute a waiver of any right or remedy City may have on account of Lessee's default. Lessee may withhold payment of any

claim in connection with a good faith dispute over the obligation to pay, so long as City's property interests are not jeopardized. If a lien is filed as a result of nonpayment, Lessee shall, within ten (10) days after knowledge of filing, provide City with an executed copy of a discharge of the lien.

21. Modifications for Permitted Mortgagees. If any Permitted Mortgagee shall require any modification(s) of this Subsurface Lease, City shall, at Lessee's request, promptly execute and deliver to Lessee such instruments effecting such modification(s) as Lessee shall require, provided that such modifications do not adversely affect in any material respect any of City's rights under this Subsurface Lease.
22. Notices. All notices or other communications required to be given by this Subsurface Lease shall be in writing and shall be effective three (3) days after deposited as registered or certified mail, postage prepaid, return receipt requested directed to the following addresses or to such other addresses as the City, Lessee or their assigns may specify by notice to the others from time-to-time.

To City:

City of Portland
Right-of-Way Acquisition Supervisor
1120 S.W. Fifth Avenue, Room 800
Portland, Oregon 97204

To Lessee:

Portland State University
Facilities and Planning-FAP
PO Box 751
Portland OR 97207-0751
Attn: Director of Facilities and Planning

23. Unavoidable Delay. Each party hereto shall be excused from performing any of its obligations or undertakings provided in this Subsurface Lease (except any of its obligations to pay any sums of money under the applicable provisions hereof) for so long as the performance of such obligation is prevented or delayed by any cause which is beyond the control of such party, including but not limited to such of the following: Acts of God; acts of the other party; fire; earthquake; flood; explosion; action of the elements; war; invasion; insurrection; riot; mob violence; sabotage; malicious mischief; inability to procure or general shortage or rationing or regulation of labor, equipment, facilities, sources of energy (including, without limitation, electricity, gas, gasoline or steam), materials or supplies in the open market; failure of transportation; strikes; lockouts; action of labor unions; condemnation; requisition; or order of government or civil or military or naval authorities; or any other cause, whether similar or dissimilar to the foregoing, not within the control of such party; provided, however, that no party shall be entitled to relief under this Section by reason of any event unless such party shall have given the other parties notice of such event and the nature of such event within a reasonable time after the occurrence of such event.
24. Estoppel Certificates.
- A. Each party agrees that at any time and from time to time at reasonable intervals, within Thirty (30) days after written request by the other party, it will execute, and deliver to the requesting party, or to any prospective Permitted Mortgagee, assignee or sub lessee,

designated by such requesting party, a certificate stating (i) that this Subsurface Lease is unmodified and in force and effect (or if there have been modifications, that this Subsurface Lease is in force and effect as modified, and identifying the modification agreements, or if this Subsurface Lease is not in force and effect the certificate shall so state); (ii) whether or not there is any existing uncured default by the requesting party in the performance of any of its obligations under this Subsurface Lease and whether or not there is any other existing default by either party under this Subsurface Lease with respect to which notice of default has been served, and if there is any such default, specifying the nature and extent thereof; and (iii) whether or not there are any setoffs, defenses or counterclaims against enforcement of the obligations of the requesting party. In the event that an estoppel certificate request is broader than what is provided for herein, then deadlines contained in this Section will be extended to thirty (30) days.

- B. Before the expiration or termination of this Subsurface Lease, title to the Improvements and equipment and any other property of Lessee from time to time located in the Subsurface Space shall not vest in the City by reason of its property interest in the public right-of-way but title to such improvements shall remain in Lessee. If this Subsurface Lease terminates before the expiration of the term hereof, and if, at that time any Interested Parties shall exercise its option to obtain a new lease of the remainder of the term of this Subsurface Lease, then title to the improvements shall automatically pass to, vest in and belong to such Interested Parties or any successor to or purchaser of any Interested Parties' interest permitted hereunder, until the expiration or sooner termination of the term of such new lease. The City and Lessee covenant that to confirm the automatic vesting of title as provided in this Section, each will execute and deliver such further assurances and instruments of assignment and conveyance as reasonably may be required by the other or by Interested Parties for that purpose.

25. Security Deposit.

No security deposit is required at time of execution of this Lease. Upon an event of default and at City's sole discretion regardless of whether Lessee timely cures the default, City may require that Lessee deposit with City a sum equal to the Base Rent payable for the lease year, as security to assure performance by Lessee of all of the covenants and terms of this Lease, in addition to any cure of Lessee's default that may be required. Thereafter, City may, from time to time, without prejudice to any other remedy, use all or a portion of the security deposit to satisfy past due Rent or to cure any uncured default by Lessee, and Lessee shall replenish the security deposit to the original amount immediately upon demand. The security deposit, along with accrued interest, is the property of City. No part of the security deposit shall be considered held in trust or be prepayment for any monies to be paid by Lessee under the Lease. Lessee is not, under any circumstances, entitled to the accrual of interest on the security deposit amount. The return of any portion of the security deposit, is contingent upon Lessee having fully and faithfully carried out all provisions of the Lease without breach or default, during the full lease term, including payment of all monies due to City and surrender of the Premises according to the terms of this Lease

26. General Provisions.

- A. Headings. Any titles of the several parts and sections of this Subsurface Lease are inserted for convenience of reference only and shall be disregarded in constructing or interpreting any of its provisions.
- B. Partial Invalidity. Any section of this lease which shall prove to be invalid, void, or illegal shall in no way affect, impair, or invalidate any other section of the Subsurface Lease and other sections shall remain in full force and effect. The City Council may revoke this Subsurface Lease in the event that any provision becomes invalid or unenforceable and the City Council expressly finds that such provision constituted a consideration material to City entering into this Subsurface Lease.
- C. Waivers. No waiver made by either party with respect to the performance, or manner or time thereof of any obligation of the other party or any condition of its own obligation under this Subsurface Lease shall be considered a waiver of any rights of the party making the waiver with respect to the particular obligation of the other party or condition of its own obligation beyond those expressly waived and to the extent thereof, or a waiver in any respect in regard to any other rights of the party making the waiver or any other obligations of the party. No waiver by the Lessee or the City of any provision of this Subsurface Lease or any breach thereof, shall be of any force and effect unless in writing and no such waiver shall be construed to be a continuing waiver
- D. Enforcement.
 - 1) Should any dispute arise between the parties to this agreement, it is agreed that such dispute will be submitted to a mediator prior to any litigation, and the parties hereby expressly agree that no claim or dispute arising under the terms of this agreement shall be resolved other than first through mediation and, only in the event said mediation efforts fail, through litigation. In the event of mediation, each party shall share the charges of the mediator equally, and each shall bear their own costs and expenses. Any litigation involving or relating to the terms of this agreement or the exhibits attached hereto shall be tried to the court without a jury.
 - 2) The parties shall exercise good faith efforts to select a mediator who shall be compensated by the parties, each paying one-half, equally, of the mediation costs and charges. Mediation will be conducted in Portland, Oregon, unless both parties agree in writing otherwise. Both parties agree to exercise good faith efforts to resolve disputes covered by this article through this mediation process. If a party requests mediation and the other party fails to respond within ten (10) days, or if the parties fail to agree on a mediator within ten (10) days, a mediator shall be appointed by the presiding judge of the Multnomah County Circuit Court upon the request of either party. The parties shall have any rights at law or in equity with respect to any dispute not covered by this article.

- E. Choice of Law. This Subsurface Lease shall be interpreted, construed, and enforced in accordance with, and governed by, the laws of the State of Oregon without regard to any conflict of laws provisions that would require the application of the law of any other jurisdiction.
- F. Consent of City. Whenever consent, approval or direction by City is required under the terms contained herein, all such consent, approval or direction shall be in writing from the City Engineer, Bureau of Transportation and such approval, consent or direction shall not unreasonably be withheld, conditioned, or delayed.
- G. Recordation. A short form memorandum of lease will be recorded in lieu of recording the Subsurface Lease in its entirety, with a copy of said memorandum of lease to be provided to the Office of the County Assessor by City.
- H. Time of Essence. Time is of the essence of this Subsurface Lease. All obligations of the Lessee and the City to each other shall be due at the date specified by this Subsurface Lease.
- I. Americans With Disabilities Compliance. Lessee is responsible, at its sole expense, for any compliance with all applicable sections of the Americans With Disabilities Act of 1990 (ADA), as it may be amended, including any duty the ADA may impose on City or Lessee as a result of Lessee's use, occupation, or alteration of the Premises.
- J. Calculation of Time. If the time for execution or completion of any action required in this Subsurface Lease falls on a Saturday, Sunday or holiday, the period shall be extended to include the next day that is not a Saturday, Sunday or holiday.
- K. Construction. In construing this Subsurface Lease, if the context so requires, the singular pronoun shall be taken to mean and include the plural, and the masculine shall include the feminine and the neuter. All provisions of this Subsurface Lease have been negotiated at arms length, and this Subsurface Lease shall not be construed for or against any Party by reason of the authorship or alleged authorship of any provision of this Subsurface Lease.
- L. Entire Agreement. This Subsurface Lease and the attachments hereto are the entire agreement between the parties and there is no other oral or written agreement between the parties with regard to this subject matter.
- M. Amendments. City and Lessee may amend this Subsurface Lease at any time only by written amendment executed by City and Lessee. Unless otherwise expressly provided in this Subsurface Lease, any amendment that increases City's risk must be approved by City Council by ordinance enactment. City's Right-of-Way Acquisition Supervisor, or his or her successor, may approve an amendment increasing the amount of compensation to City. City's Right-of-Way Acquisition Supervisor may agree to and execute any other amendment on behalf of City.
- N. Place of Enforcement. Any action or suit to enforce or construe any provision of this Subsurface Lease by any party shall be brought in the Circuit Court of the State of Oregon for Multnomah County, or the United States District Court for the District of Oregon.
- O. No Partnership. Neither anything in this Subsurface Lease contained nor any acts of the parties hereto shall be deemed or construed by the parties hereto, or any of them, or any third person, to create the relationship of principal and agent, or of partnership, or of joint venture, or of any association between any of the parties to this Subsurface Lease, other than City and Lessee.

- P. Non Waiver of Governmental Rights. Subject to the terms and conditions of this Subsurface Lease, by making this Subsurface Lease the City is specifically not obligating itself or any other agency with respect to any discretionary action relating to development or operation of the improvements to be constructed on the blocks or the street property, including, but not limited to, re-zonings, variances, environmental clearances or any other governmental agency approvals or permits which are or may be required. The City specifically reserves all of its rights to exercise its police power for the benefit of the public, including, but not limited to, its right to enter, inspect, or order the Subsurface Space vacated, for the public health, safety or welfare. This Section grants to the City no greater or lesser rights than City has by virtue of its municipality status.
- Q. Non Exclusive Remedies. The rights and remedies expressly afforded under the provisions of this Subsurface Lease shall not be deemed exclusive, except where otherwise indicated, and shall be in addition to and cumulative with any and all rights otherwise available at law or in equity, and the exercise by either party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other such remedies for the same default or breach or of any of its remedies for any other default or breach by the other party.
- R. Reservation of Easements. Nothing herein shall cause or require the removal or abandonment of any sewer, water or gas main, street light facilities, traffic signal facilities, public transit facility, or appurtenance, conduit of any kind, wire, pole or thing used, or intended to be used, for any public service, and right is hereby reserved for the owner of any such utility or thing to maintain, continue, repair, reconstruct, renew, replace, rebuild, and/or enlarge any and all such thing. Lessee's rights to use the entire Subsurface Space are subject at all times to the construction, installation, operation, maintenance, or reconstruction of any utility or public transportation facility that provide a public service. No building or structure of any kind shall be built or erected within a distance of ten (10) feet from the centerline of any such utility, except with the prior written consent of the City Engineer and the owner of the utility. Any and all contemplated building plans shall be submitted for approval to the City Engineer and to the Director of the Bureau of Development Services, to the end that such construction may be so adjusted with reference to all existing public utilities as to cause a minimum of danger or inconvenience to the public and to the owner of such utility or public transportation facility, and to protect and preserve the same as presently constructed or hereinafter reconstructed, renewed, replaced and/or enlarged.
- S. Public Use. If for any reason the City requires the lease space or any portion thereof for purposes of any public improvements, City at its sole discretion, may terminate this lease. If City terminates the lease for purposes of public improvements, then Lessee's sole and exclusive remedy shall be the return of any prepaid rents. No expenditure of money, lapse of time, act, event, or other occurrence shall give Lessee any rights, vested or otherwise, to occupy or use the City's streets, or shall operation as an estoppel against, or a waiver by, the City
- T. Administrative Fees. The Lessee shall pay any costs incurred by City in connection with a request for consents, estoppel certificates, assignments, subletting, transfer, occupation, or use or other administrative actions that may be required under this lease within 45 days upon City's request.

IN WITNESS WHEREOF, State of Oregon, acting by and through the State Board of Higher Education on behalf of Portland State University, pursuant to a resolution of its Board of Directors, duly and legally adopted, has caused these presents to be signed by Danise F. Wendler (name) as Assoc VP Finance (title) this 15th day of April, 20 11.

State of Oregon, acting by and through the State Board of Higher Education on behalf of Portland State University

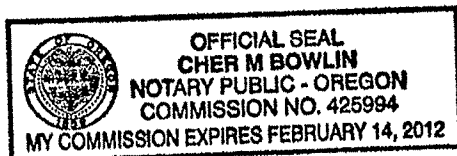
By:

Danise Wendler
Name and title

STATE OF Oregon

County of Multnomah

This instrument was acknowledged before me on April 1, 20 11, by Danise Wendler (name) as Assoc. VP Finance & Controller (title) of State of Oregon, acting by and through the State Board of Higher Education on behalf of Portland State University.



Cheri M. Widdenberg
Notary Public for State of Oregon
My Commission expires February 14, 2012

This Section Intentionally Left Blank

CITY OF PORTLAND

By: _____ By: _____
 Sam Adams LaVonne Griffin-Valade
 Mayor Auditor or designee

STATE OF OREGON)
)
 County of Multnomah)

Personally appeared Sam Adams, who being duly sworn (or affirmed) before me on this _____ day of _____, 2010, did say that he is the Mayor of the City of Portland, a municipal corporation, and that said instrument was signed in behalf of said corporation by authority of its City Council and acknowledged said instrument to be its voluntary act and deed.

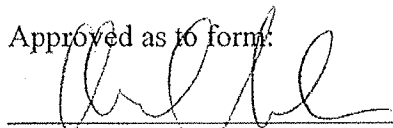
 Notary Public for Oregon
 My Commission expires _____

STATE OF OREGON)
)
 County of Multnomah)

Personally appeared LaVonne Griffin-Valade or designee who being duly sworn (or affirmed) before me on this _____ day of _____, 2010, did say that he/she is the Auditor or designee, of the City of Portland, a municipal corporation, and that said instrument was signed in behalf of said corporation by authority of its City Council and acknowledged said instrument to be its voluntary act and deed.

 Notary Public for Oregon
 My Commission expires _____

Approved as to form:



 City Attorney

Approved:

 City Engineer or designee

S:\lease\7133 PSU\DraftLease

EXHIBIT B**REQUIRED INSURANCE**

Lessee shall obtain the insurance specified in this section prior to performing under this Subsurface Lease and shall maintain it in full force and at its own expense throughout the duration of this Subsurface Lease and all warranty periods. Lessee shall obtain the following insurance from insurance companies or entities that are authorized to transact the business of insurance and issue coverage in the State of Oregon and that are acceptable to City, or with approval of City, provide this insurance coverage through a program of self insurance.

1. Workers' Compensation. All employers, including Lessee, that employ subject workers who work under this Subsurface Lease within the State of Oregon shall comply with ORS 656.017 and provide the required workers' compensation coverage, unless the employers are exempt under ORS 656.126(2). Lessee shall require each of its subcontractors, if any, to comply with, and shall ensure that each of its subcontractors, if any, complies with, these requirements.

2. Commercial General Liability. This to cover Bodily Injury, Death and Property Damage. This insurance shall include contractual liability coverage for the indemnity provided under this Subsurface Lease, personal and advertising injury liability, products liability and completed operations liability. Coverage may be written in combination with Automobile Liability Insurance (with separate limits). Lessee shall provide proof of insurance of not less than the following amounts:

Amounts not less than the amounts listed in the following schedule:

Combined single limit per occurrence:

From commencement of the Subsurface Lease term to June 30, 2010	\$1,500,000
July 1, 2010 to June 30, 2011	\$1,600,000
July 1, 2011 to June 30, 2012	\$1,700,000

Aggregate limit for all claims per occurrence:

From commencement of the Subsurface Lease term to June 30, 2010:	\$3,000,000
July 1, 2010 to June 30, 2011	\$3,200,000
July 1, 2011 to June 30, 2012	\$3,400,000

Amounts not less than the amounts listed in the following schedule:

Combined single limit per occurrence shall not be less than the following schedule:

From commencement of the Subsurface Lease term to January 1, 2010: \$100,000.

From January 1, 2010, and every year thereafter the adjusted limitation as determined by the State Court Administrator pursuant to Oregon Laws 2009, chapter 67, section 5 (Senate Bill 311).

Aggregate limits for all claims per occurrence shall not be less than the amounts listed in the following schedule:

From commencement of the Subsurface Lease term to January 1, 2010: \$500,000

From January 1, 2010, and every year thereafter the adjusted limitation as determined by the State Court Administrator pursuant to Oregon Laws 2009, chapter 67, section 5 (Senate Bill 311).

3. Automobile Liability. This is to cover each accident for bodily Injury and Property Damage, including coverage for owned, hired or non-owned vehicles, as applicable. This coverage may be written in combination with the Commercial General Liability Insurance.

Lessee shall provide proof of insurance of not less than the following amounts:

Amounts not less than the amounts listed in the following schedule:

Combined single limit per occurrence:

From commencement of the Subsurface Lease term to June 30, 2010	\$1,500,000
July 1, 2010 to June 30, 2011	\$1,600,000
July 1, 2011 to June 30, 2012	\$1,700,000

Aggregate limit for all claims per occurrence:

From commencement of the Subsurface Lease term to June 30, 2010:	\$3,000,000
July 1, 2010 to June 30, 2011	\$3,200,000
July 1, 2011 to June 30, 2012	\$3,400,000

Amounts not less than the amounts listed in the following schedule:

Combined single limit per occurrence shall not be less than the following schedule:

From commencement of the Subsurface Lease term to January 1, 2010: \$100,000.

From January 1, 2010, and every year thereafter the adjusted limitation as determined by the State Court Administrator pursuant to Oregon Laws 2009, chapter 67, section 5 (Senate Bill 311).

Aggregate limits for all claims per occurrence shall not be less than the amounts listed in the following schedule:

From commencement of the Subsurface Lease term to January 1, 2010: \$500,000

From January 1, 2010, and every year thereafter the adjusted limitation as determined by the State Court Administrator pursuant to Oregon Laws 2009, chapter 67, section 5 (Senate Bill 311).

4. Additional Insured.

The Commercial General Liability insurance and Automobile Liability insurance required under this Subsurface Lease shall include City, and its agencies, departments, divisions, commissions, branches, officers, employees and agents as Additional Insureds but only with respect to Lessee's performance obligations under this Subsurface Lease. Lessee shall ensure that coverage is primary and non-contributory with any other insurance and self-insurance. Such insurance shall be for the protection of the City, its officers and employees for any claim or claims for personal injury or property damage asserted against the City, its officers or employees due to the construction, maintenance or use of the facilities constructed in the Subsurface Space.

5. "Tail" Coverage

If any of the required liability insurance is on a "claims made" basis, Lessee shall maintain either "tail" coverage or continuous "claims made" liability coverage, provided the effective date of the continuous "claims made" coverage is on or before the effective date of this Subsurface Lease, for a minimum of 24 months following the later of

(i) Lessee's completion of all Services and City's acceptance of all Services required under this Subsurface Lease, or

(ii) the expiration of all warranty periods provided under this Subsurface Lease. Notwithstanding the foregoing 24-month requirement, if Lessee elects to maintain "tail" coverage and if the maximum time period "tail" coverage reasonably available in the marketplace is less than the 24-month period described above, then Lessee shall maintain "tail" coverage for the maximum time period that "tail" coverage is reasonably available in the marketplace for the coverage required under this Subsurface Lease. Lessee shall provide to City, upon City's request, certification of the coverage required under this section 4.C.

6. Notice of Cancellation or Change

There shall be no cancellation, material change, potential exhaustion of aggregate limits or non-renewal of insurance coverage(s) without sixty (60) days' written notice from this Lessee or its insurer(s) to City. Any failure to comply with the reporting provisions of this clause shall constitute a material breach of the Subsurface Lease and shall be grounds for immediate termination of this Subsurface Lease by City.

7. Certificate(s) of Insurance.

As evidence of the insurance coverage's required by the Subsurface Lease, Lessee shall maintain and file with the City Auditor in a form and with a company to be reasonably approved by the City Attorney, Certificate(s) of Insurance for all required insurance under this Subsurface Lease. The Certificate(s) must specify all entities and individuals who are endorsed on the policy as Additional Insured (or Loss Payees). Lessee shall pay for all deductibles, self-insured retention and self-insurance, if any. If Lessee already has a policy of insurance meeting the above provisions as to amount, a certificate of insurance or certified copy of such policy may be furnished provided that a rider, endorsement or other provision is supplied making such insurance available to the City. Lessee shall maintain or cause to be maintained such insurance in force and effect during the term of this Subsurface Lease. Said policy shall carry an endorsement providing that the policy may not be cancelled without thirty (30) days' prior notice to City.