City of Stoughton, 207 S Forrest Street, Stoughton WI 53589

RESOLUTION FROM THE UTILTIES COMMITTEE TO THE STOUGHTON COMMON COUNCIL			
Approval of the Fiber Optic Agreement and Grant of Indefeasible Right of Use (IRU) Between the City of Stoughton and TDS Metrocom Committee Action: Utilities Committee to meet on March 22, 2021 Fiscal Impact: $180,000.00			
File Number:	R-35-2021	**Date Introduced:**	March 23, 2021

The City of Stoughton, Wisconsin, Common Council does proclaim as follows:

WHEREAS, Stoughton Utilities maintains 17 remote facilities, including electric substation, water production wells and storage towers, and sanitary sewer treatment facilities and pumping stations, and each of these facilities contain numerous pieces of networked equipment that communicate with our operational control and security systems; and

WHEREAS, There exists a need for secure dedicated fiber optic communications (dark fiber) between these remote facilities and the Stoughton Utilities Administration Office; and

WHEREAS, Stoughton Utilities staff brought the dark fiber IRU agreement concept to the Stoughton Utilities Committee on June 9, 2020 to discuss the concept and determine the feasibility of moving forward with discussions; and

WHEREAS, Funds were allocated for the dark fiber IRU agreement in the Stoughton Utilities 2021 Budget and Five Year (2021 – 2025) Capital Improvement Projects (CIP) Plan; and

WHEREAS, Stoughton Utilities staff has negotiated an agreement with TDS Metrocom, whereby four secure dedicated and unlit (dark) fiber optic strands will be installed to connect all Stoughton Utilities remote facilities, and provided to Stoughton Utilities for their use under an Indefeasible Right of Use (IRU) agreement; and

WHEREAS, on March 22, 2021, the Stoughton Utilities Committee approved and recommended to the Stoughton Common Council the Fiber Optic Agreement and Grant of Indefeasible Right of Use (IRU) Between the City of Stoughton and TDS Metrocom; now therefore

BE IT RESOLVED by the City of Stoughton Common Council that that the proper city official(s) be hereby directed to enter into an agreement for the Fiber Optic Agreement and Grant of Indefeasible Right of Use (IRU) Between the City of Stoughton and TDS Metrocom.

Council Action: ☐ **Adopted** ☐ **Failed** **Vote:** _____

Mayoral Action: ☐ **Accept** ☐ **Veto**

_____ _____
Mayor Tim Swadley Date

Council Action: _____ ☐ **Override** **Vote:** _____

Stoughton Utilities
600 South Fourth Street
P.O. Box 383
Stoughton, WI 53589-0383

Serving Electric, Water & Wastewater Since 1886

Date: March 18, 2021

To: Stoughton Utilities Committee

From: Jill M. Weiss, P.E.
Stoughton Utilities Director

Subject: Approval of the Fiber Optic Agreement and Grant of Indefeasible Right of Use (IRU) Between the City of Stoughton and TDS Metrocom

Stoughton Utilities maintains 17 remote facilities, including electric substation, water production wells and storage towers, and sanitary sewer treatment facilities and pumping stations. Each of these facilities contain numerous pieces of networked equipment that communicate with our operational control and security systems.

Our electric, water, and wastewater Supervisory Control and Data Acquisition (SCADA) systems allow the utility to operate efficiently 24 hours a day and seven days a week, using system automation to make system modifications to provide safe and reliable service to customers without the need for human interaction for route adjustments. In addition, systems are in place for access, intrusion detection, fire, and other security requirements.

The need for secure dedicated fiber optic communications has been known by the utility team for a while, but there have not been affordable options available to us to install such systems. Following the request by TDS Metrocom to obtain an easement from the utility for the placement of one of their master control nodes, we recognized an opportunity to work with them as they built out their citywide fiber optic system to obtain dedicated fiber optic communications ("dark fiber"). On June 9, 2020, staff brought the dark fiber concept to the Stoughton Utilities Committee to discuss the concept and determine the feasibility of moving forward with discussions. Funds were allocated towards the dark fiber build in the Stoughton Utilities 2021 Budget and Five Year (2021 – 2025) Capital Improvement Projects (CIP) Plan.

After many months of discussing the possibility of such a system to connect all Stoughton Utilities remote facilities, we came to an agreement that meets the needs of both parties. Stoughton Utilities staff has been working diligently to facilitate and expedite the buildout of the new fiber optic communications network, including the pole replacement work to make our distribution system ready for the new communications attachments. In recognition of our efforts, TDS Metrocom has agreed to provide Stoughton Utilities with dedicated, unlit strands of fiber optic cable to all Stoughton Utilities facilities for a negotiated, reduced up-front cost that would not be obtainable if Stoughton Utilities were to complete a similar installation on our own, or if we were lease the facilities as a commercial customer.

The attached Fiber Optic Agreement and Grant of Indefeasible Right of Use (IRU) Between the City of Stoughton and TDS Metrocom is the result of many months of negotiation, fiber optic network review, site visits, and contract creation and review.

We are requesting that the Stoughton Utilities Committee approve the Fiber Optic Agreement and Grant of Indefeasible Right of Use (IRU) Between the City of Stoughton and TDS Metrocom, and recommend approval of the agreement to the Stoughton Common Council.

FIBER OPTIC AGREEMENT AND GRANT OF IRU

THIS AGREEMENT ("**Agreement**") is effective as of the date of the last signature below and is made by and between TDS Metrocom, LLC, a Delaware limited liability company, having an office located at 525 Junction Road, Suite 6000, Madison, Wisconsin 53717 ("**TDS**") and the City of Stoughton, Wisconsin, operating in its capacity as a municipal electric utility, having a place of business at 600 South 4th Street, Stoughton, WI 53589 ("**Stoughton Utilities**" or "**SU**"), each referred to as a "**Party**" or jointly referred to as the "**Parties**."

BACKGROUND

A. TDS owns, operates, and maintains an optical fiber communication transmission system in the City of Stoughton (collectively, "**TDS's Fiber System**").

B. The Parties have agreed that SU shall retain a perpetual right to use four (4) fibers in the TDS Fiber System to connect SU buildings and other SU facilities, and not for the provision of internet access or resale in any manner. A map of the interconnection points contemplated by this Agreement is included as **Attachment A**.

C. TDS and SU desire to enter into an agreement governing SU's right to use these fibers, upon all the terms and conditions set forth below.

In consideration of their mutual promises, the Parties agree as follows:

ARTICLE 1: DEFINITIONS

The following terms are used in this Agreement:

1.1 "**Acceptance**" means SU's issuance of an Acceptance Notice or deemed acceptance of a Segment and/or entire route given by SU pursuant to Article 5 of this Agreement after the SU IRU Fibers have been tested and found acceptable.

1.2 "**Acceptance Notice**" means the notice of acceptance or deemed acceptance of a Segment and/or entire route given to TDS by SU pursuant to this Agreement.

1.3 "**Dark Fiber**" means Fiber between two specified locations that has no optronics or electronics attached to it.

1.4 "**Fiber**" means one or more glass strands that are protected by a color-coded buffer tube and that are used to transmit a communication signal along the glass strand in the form of pulses of light.

1.5 "**Fiber Optic Cable**" or "**Cable**" means a collection of Fibers contained in color-coded buffer tubes with a protective outer covering, which covering includes stiffening rods and filler.

1.6 "**Indefeasible Right of Use**" or "**IRU**" is an exclusive and irrevocable right, for the term of this Agreement as set out in Article 3, to use the SU IRU Fibers, provided, however, that granting of such IRU does not convey legal title to the Fibers.

1.7 "**Initial Segments**" means each Segment identified on **Exhibit A-1**.

1.8 "**IRU Effective Date**" means the date of Acceptance for a completed Segment.

1.9 "**Proportionate Share**" means the percentage determined by dividing the number of SU IRU Fibers in the TDS Cable by the total number of Fibers in the same TDS Cable.

1.10 "**Rejection Notice**" means the notice of rejection of a Segment and/or entire route given to TDS by SU pursuant to this Agreement.

1.11 "**Rights-of-Way** "or "**Rights**" see Article 13 for definition.

1.12 "**Segments**" are portions of Cable routes specified in **Exhibit A-1** of this Agreement (as amended or supplemented from time to time), which are capable of being tested and accepted.

1.13 "**SU IRU Fibers**" are the Dark Fibers in the TDS Cable as to which SU obtains an IRU pursuant to this Agreement.

1.14 "**TDS Cable**" means a Cable containing one or more Dark Fibers owned by TDS and in which SU has an IRU pursuant to the terms of this Agreement.

ARTICLE 2: FIBER OPTIC AGREEMENT

2.1 Subject to the terms and conditions of this Agreement, TDS grants SU an IRU in up to four (4) Dark Fibers in the TDS Cables as specifically described in **Exhibit A-1**. The IRU includes a non-exclusive right to use tangible and intangible property owned by TDS in order to use the SU IRU Fibers, including but not limited to cable sheathing, troughing, pedestals, slack containers, and related equipment necessary for the operation and use of the SU IRU Fibers as contemplated herein, but excluding any electronic or optronic equipment, which shall be provided by SU at its sole cost. The purpose of the SU IRU Fibers is to enable SU to connect the SU sites shown on **Attachment A** via the Initial Segments. SU shall be entitled to use the SU IRU Fibers solely to connect SU buildings and other SU facilities and not to serve any other third party.

2.2 From time to time after execution of this Agreement, additional Segments may be incorporated into this Agreement by both parties executing a supplemental exhibit in the form of **Exhibit A-x** of this Agreement ("**Additional Segments**"). For all Additional Segments in which an IRU is granted to SU, the separate **Exhibit A-x**, executed by both parties, will be attached hereto and titled so as to identify this Agreement, the Additional Segment(s) affected, the resulting IRU fee, if any, and any other material terms and conditions relating to the Additional Segment(s). Any provision relating to the affected Additional Segment contained in a supplemental **Exhibit A-x** that is more specific than a

comparable or contrary provision contained in this Agreement shall control with respect to that Additional Segment. Upon Acceptance of the Additional Segment set forth in a supplemental **Exhibit A-x**, SU shall acquire an IRU for the SU IRU Fibers specified in the supplemental **Exhibit A-x**. In the event that this Agreement is terminated with respect to the Initial Segments, the Agreement shall continue as necessary with respect to any Additional Segments.

2.3 This Agreement does not obligate TDS to supply to SU any optical or electrical equipment or other facilities, including without limitation, local distribution facilities, collocation space, regeneration facilities, generators, batteries, air conditioners, fire protection equipment, monitoring equipment, and testing equipment, all of which are the sole responsibility of SU.

ARTICLE 3: IRU EFFECTIVE DATE AND TERM

3.1 SU will be entitled to use the SU IRU Fibers upon Acceptance of an Initial Segment containing those Fibers. The initial IRU term for all Initial Segments shall start on the Acceptance date of the first Initial Segment to be constructed and accepted and shall terminate after twenty (20) years ("**Initial IRU Term**"). For the sake of clarity, all Initial Segments shall have the same Initial IRU Term. Provided that SU is not then in default under this Agreement, the IRU term shall automatically renew for four (4) consecutive terms of five (5) years each (each a "**Renewal Term**"), unless either Party shall give notice to the other of its intention not to renew 180 days before the end of the Initial IRU Term or any Renewal Term, in which case the IRU term and this Agreement with respect to the Initial Segments shall terminate at the end of the term in which notice was given. However, if at the end of the Initial IRU Term, TDS abandons the Cable entirely, SU will have the right to take possession of and maintain the SU IRU Fiber assets without any cost to SU. Moreover, should TDS desire to replace the SU IRU Fibers at any time during the Initial IRU Term or any Renewal Term, this Agreement will continue with respect to the replaced SU IRU Fibers on the same terms and conditions set forth herein.

3.2 Expiration or termination of this Agreement shall not affect the rights or obligations of any Party with respect to any payments of expenses incurred prior to the date of termination or pursuant to Article 10 (Taxes); Article 11 (Liability); and Article 13 (Permits and Required Rights).

ARTICLE 4: CONSIDERATION AND PAYMENT

4.1 As consideration for the provision of the SU IRU Fibers described in **Exhibit A-1**, SU shall make a one-time, non-recurring IRU fee payment to TDS in the amount specified in **Exhibit A-1** ("**Payment**"). TDS shall invoice SU for the Payment within 90 days of the full execution of this Agreement, which Payment SU shall make within thirty (30) days of SU's receipt of TDS's invoice. The invoice will show in detail TDS's estimated actual cost of constructing the SU IRU Fibers described in **Exhibit A-1**. If the actual cost of construction is less than the Payment SU made, TDS shall refund the difference to SU within sixty (60) days after completion of construction.

4.2 For accounting, tax, and state regulatory purposes, SU shall be treated as the beneficial owner of the SU IRU Fibers.

4.3 TDS shall be responsible for splicing and testing to provide the SU IRU Fibers. After Acceptance, any cost for additional splicing and testing for SU to access the SU IRU Fibers will be billed to and paid by SU within thirty (30) days after receipt of TDS's invoice.

4.4 Within sixty (60) days of SU's Acceptance of the last of the Initial Segments, TDS shall invoice SU for the first annual maintenance fee as set forth in **Exhibit A-1**. SU shall pay such annual invoices within thirty (30) days after receipt of TDS's invoice.

4.5 It is understood and acknowledged that TDS shall be deemed the legal owner of the SU IRU Fibers.

ARTICLE 5: ACCEPTANCE AND DOCUMENTATION

5.1 The acceptance procedures set out in this Article 5 apply to each Segment containing the SU IRU Fibers once constructed and tested. At the completion of a Segment's construction, TDS shall provide SU the opportunity to perform, subject to the protocols of the Rights-of-Way agreements, a physical inspection of SU IRU Fibers and routes. In addition, TDS shall provide the acceptance test plan ("**ATP**") and test results for the SU IRU Fibers in accordance with the requirements of **Exhibit B**.

5.2 Within fourteen (14) days after receiving the ATP and test results for a completed Segment, SU shall have the option to inspect the SU IRU Fibers in that Segment in accordance with the **Exhibit B** acceptance tests. SU shall then provide TDS with either an "**Acceptance Notice**" or a "**Rejection Notice**" in the form attached as **Exhibit C**, with an explanation of how the SU IRU Fibers do not meet the specifications set out in **Exhibit B** in the case of a Rejection. TDS will cooperate with SU to provide additional Documentation (as defined below) that would reasonably allow SU to evaluate the acceptability of the SU IRU Fibers. In addition, SU shall be allowed, subject to the protocols of the Rights-of-Way agreements, to conduct its own tests, at SU's expense, to determine acceptability of the SU IRU Fibers. Issuance of an Acceptance Notice or failure to issue a Rejection Notice during the time period indicated above shall constitute Acceptance of the SU IRU Fibers by SU, but such Acceptance shall not invalidate the warranties described in this Agreement.

5.3 Should SU reject the SU IRU Fibers by providing a Rejection Notice within the applicable 14-day period ("**Rejection**"), TDS shall use commercially reasonable efforts, including retesting the SU IRU Fibers, to substantially cure the material defective conditions identified in the Rejection Notice within sixty (60) days and to ensure the SU IRU Fibers conform to the specifications in **Exhibit B**. The 60-day cure period shall be extended if the material defective conditions cannot be reasonably remedied within such time period and if TDS proceeds diligently to cure the material defective conditions after receipt of the Rejection Notice. Upon substantial cure, the additional SU IRU Fibers shall be deemed accepted by SU.

5.4 Any disputes as to Acceptance or Rejection of any SU IRU Fibers shall be resolved in accordance with Article 22.

5.5 Within ninety (90) days after Acceptance of any SU IRU Fibers, TDS shall provide general, non-proprietary documentation regarding the Cable, which shall consist of the following: (i) a route diagram that illustrates the location of the end, mid span splice, and mid span repeater locations; (ii) a summary of distances between such locations; (iii) the type of Cable construction between locations; and (iv) any geographical information deemed necessary to further clarify the route ("**Documentation**"). Documentation may be provided or obtained from a third party through which TDS has obtained an IRU.

ARTICLE 6: FRANCHISE/LICENSE/PERMIT FEES

6.1 Each Party will be responsible for the appropriate government filings, licenses, or other requirements to place its Fibers into operation, including, but not limited to, applicable municipal licenses and/or franchise agreements.

6.2 Pole attachment, permit, or easement fees or any other fees related to the construction of a Segment will be the responsibility of and paid for by TDS.

ARTICLE 7: MAINTENANCE AND REPAIR

7.1 TDS warrants that it will use commercially reasonable efforts to maintain the TDS Cables in accordance with prevailing telecommunications industry standards and with the standards contained in **Exhibit D**.

7.2 All routine maintenance and repair functions and emergency maintenance and repair functions, including "one-call" responses, and conduit locate services shall be performed by TDS or its designee for a period coterminous with the term of this Agreement at TDS's expense, subject to reimbursement for emergency maintenance as provided below.

7.2.1 *Emergency Maintenance*. TDS shall respond to any failure, interruption, or impairment in the operation of the SU IRU Fibers within four (4) hours after receiving a report of any such failure, interruption, or impairment. TDS shall use commercially reasonable efforts to perform maintenance and repair to correct any failure, interruption or impairment in the operation of the SU IRU Fibers within eight (8) hours in accordance with the procedures set forth in **Exhibit D**. Except as contemplated in Section 7.3 below, SU shall not pay for any emergency maintenance. SU may assist with emergency maintenance if approved by TDS.

7.2.2 *Routine Maintenance*. TDS shall schedule and perform specific periodic maintenance and repair checks and services, as set forth in standards attached as **Exhibit D**. Additional maintenance can be performed from time to time on the SU IRU Fibers at TDS's reasonable discretion or upon SU's reasonable request with reasonable advance notice to TDS. The annual maintenance fee described in this Article 7 covers all routine maintenance.

7.3 SU will reimburse one hundred percent of all costs associated with damage to the SU IRU Fibers, or any Segment thereof, caused by the negligence or willful misconduct of SU, its employees, agents, or contractors.

7.4 TDS shall repair, at its sole expense and without reimbursement from SU, any damage to the SU IRU Fibers, or any Segment thereof, caused by neglect or willful misconduct of TDS, its affiliates, employees, contractors or agents.

7.5 TDS will, upon SU's request, perform maintenance, restoration, or relocation of fiber laterals outside of the right-of-way and shall charge SU on a time and materials basis.

7.6 TDS shall provide reasonable advance notice to SU of maintenance or repairs that may affect the SU IRU Fibers. SU shall have the right, subject to the protocols of the Right-of-Way agreements, to have a representative present any time maintenance or repairs are performed that may affect the SU IRU Fibers.

ARTICLE 8: SPLICING

8.1 It may be necessary to splice SU IRU Fibers into the TDS Cable. In order to maintain the integrity of the TDS Cable after Acceptance, TDS, or a contractor operating under TDS's direction, must perform all splicing performed on the TDS Cable.

8.2 For future expansion at existing splice points, TDS will perform the necessary splicing upon written or email request by SU. Normal requests for splicing shall be submitted at least thirty (30) business days prior to the requested splicing date, and expedited requests shall be submitted at least fifteen (15) business days prior to the requested splicing date. TDS shall obtain any and all permits necessary for such splicing. SU agrees that it will not perform any splicing or interfere in any manner with the TDS Cable.

8.3 After Acceptance, the cost of splicing Fibers into the TDS Cable will be borne by SU. The optical splice points for each route shall be mutually agreed upon in writing by the Parties. TDS shall provide SU with a splicing and splice testing schedule(s) so SU's representative may be present, subject to protocols of Rights-of-Way agreements. Splicing documentation (ATP and test results) will be provided by TDS within ninety (90) days after splicing is completed.

8.4 SU shall provide thirty (30) business days' written notification to TDS if a new splice point is needed after initial Acceptance of a Segment. Approval of new splice points will be at the sole discretion of TDS, and such approval shall not be unreasonably withheld.

8.5 All splicing will be performed by the fusion splicing method or by any other method that is mutually agreeable to the Parties.

ARTICLE 9: WARRANTIES

9.1 TDS represents and warrants, at the time of Acceptance, its constructed Cable(s) to be of good workmanship and materials, except any materials that are separately warranted by

the manufacturer, and further warrants the SU IRU Fibers to perform and operate in accordance with the manufacturer's specifications and industry standards.

9.2 TDS represents and warrants that all equipment and materials to be used in the construction of the SU IRU Fibers covered by this Agreement (other than those in TDS's Fiber System) will be new, of good quality, properly constructed and/or installed, free of defects, and in conformity with the requirements of this Agreement. Such warranty shall be effective, with respect to each specific Segment for the same period of warranty provided to TDS by its contractors (normally a one (1) year period from date of acceptance by TDS). All work not conforming to the standards may be considered defective by SU, and TDS shall immediately replace any damaged or defective work at its own expense. TDS shall use reasonable efforts to promptly repair or replace all such defective work, provided that TDS shall repair or replace such defective work within thirty (30) days following its confirmation of the defect, unless reasonable circumstances dictate a shorter or longer period, in which event the Parties shall in good faith mutually agree upon such period. All replaced defective equipment or items shall become the sole property of TDS.

9.3 SU's sole and exclusive remedy and TDS's sole and exclusive maximum liability under the warranties contained in this Article 9 shall be, at the sole option of TDS, to repair (with new or functionally operative parts) or replace any defective portion of the TDS Cable of which TDS receives notice during the warranty period, provided that TDS is promptly notified in writing upon discovery by SU that any portion of the SU IRU Fibers has failed to conform with the terms of this Agreement, such writing to include an explanation of alleged defects.

9.4 In addition to the foregoing warranties, TDS hereby assigns to SU, and SU shall have the benefit of, any and all contractors' and suppliers' warranties with respect to the TDS Cable and material contained therein.

9.5 TDS's warranty does not extend to defects caused by acts of nature, accident, fire or other hazard, nor resulting from SU's, its designees' or third Parties' misuse, neglect, alterations, storage, attempts to repair, or use of other supplies not meeting specifications.

9.6 THE FOREGOING WARRANTIES AND REMEDIES CONSTITUTE THE ONLY WARRANTIES WITH RESPECT TO THE TDS CABLE AND ARE EXCLUSIVE REMEDIES IN THE EVENT OF BREACH OF SUCH WARRANTIES. SUCH WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NEITHER PARTY SHALL IN ANY EVENT BE LIABLE FOR ANY INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY NATURE WHATSOEVER FOR ANY REASON.

ARTICLE 10: TAXES

10.1 As used in this Article 10, "**Tax**" shall mean any tax, assessment, charge, or levy imposed by any authority having the power to tax, including any city, county, state, or federal government or quasi-governmental agency or taxing authority.

10.2. Upon SU's Acceptance of the SU IRU Fibers, it shall be responsible for any and all sales, use, income, gross receipts, or other Tax assessed on the basis of SU's use of the SU IRU Fibers. Upon SU's Acceptance of the SU IRU Fibers, it shall be solely responsible for any real or personal property Taxes relating in any way to the SU IRU Fibers, and SU shall reimburse TDS for SU's Proportionate Share of any such Tax TDS is assessed and pays. The Parties shall cooperate to minimize adverse tax consequences and may mutually amend this Agreement to improve their respective tax positions.

ARTICLE 11: LIABILITY

11.1 Each Party shall be responsible its own acts, errors, or omissions and for the acts, errors, or omissions of its employees, officers, officials, agents, boards, committees, and commissions, and shall be responsible for any losses, claims, and liabilities (including providing its own defense) that are attributable to such acts, errors, or omissions arising out of this Agreement. In situations involving joint liability, each Party shall only be responsible for such losses, claims, and liabilities that are attributable to its own acts, errors, or omissions and the acts, errors or omissions of its employees, officers, officials, agents, boards, committees, and commissions.

11.2 Neither Party shall be liable to the other for any indirect, special, punitive, or consequential damages (including, but not limited to, any claim for loss of services) arising under this Agreement or from any breach or partial breach of the provisions of this Agreement or arising out of any act or omission of either Party, its departments, elected officials, board members, commissioners, directors, officers, employees, servants, contractors, and/or agents.

11.3 No provision of this Agreement is intended, or shall be construed, to be a waiver for any purpose by SU of any provision of Wis. Stat. § 893.80 or § 345.05 or any other notice requirements, governmental immunities, or damages limitations that may apply to SU or any of its utilities, departments, employees, officers, elected officials, board members, commissioners, or agents.

11.4 Nothing contained herein shall operate as a limitation on the right of either Party to bring an action for damages, including consequential damages, against any third party based on any acts or omissions of such third party as such acts or omissions may affect the operation or use of the TDS Cable or any SU IRU Fibers; provided, however, that each Party shall assign such rights or claims, execute such documents and do whatever else may be reasonably necessary to enable the injured Party to pursue any such action against such third party.

ARTICLE 12: FORCE MAJEURE

12.1 The obligations of the Parties (except for the payment of money hereunder) are subject to force majeure, and neither Party shall be in default under this Agreement if any failure or delay in performance is caused by strike or other labor dispute; accidents; acts of God; fire; flood; earthquake; lightning; unusually severe weather; material or facility shortages or unavailability not resulting from such Party's failure to timely place orders therefor; lack of transportation; legal inability to access property; acts of any governmental authority; government codes, ordinances, laws, rules, and regulations or restrictions (collectively "**Regulations**") (but not to the extent the delay caused by such could be avoided by rerouting the Cable if such a reroute was commercially reasonable); condemnation or the exercise of rights of eminent domain; war or civil disorder; or any other cause beyond the reasonable control of either Party. The excused Party shall use reasonable efforts under the circumstances to avoid or remove such causes of non-performance and shall proceed to perform with reasonable dispatch whenever such causes are removed or ceased. Notification shall be given by the excused Party of the cause and of the estimated duration of the delay, when possible.

ARTICLE 13: PERMITS AND REQUIRED RIGHTS-OF-WAY

13.1 TDS shall obtain, on or before Acceptance with respect to each Segment to be added hereunder, any and all right-of-way agreements, easements, licenses, rights, or other agreement necessary for the use of poles, conduit, cable, wire, physical plant facilities, and/or access to real property underlying the TDS Cable ("**Rights-of-Way**" or "**Rights**"). Further, as of Acceptance, TDS shall obtain any and all rights, licenses, franchises, authorizations, agreements, permits, and approvals (including without limitation, any necessary local, state, federal or tribal authorizations and environmental permits) and collectively referred to as "**Permits**," that are necessary for the operation of the TDS Cable. TDS shall obtain all Rights and Permits in the name of TDS.

13.2 It is expressly understood that TDS's and SU's obligations under this Agreement are conditioned upon and shall in all respects be subject to the continuation or acquisition of such Rights and Permits. TDS hall use its best efforts to obtain or to cause such Rights and Permits to remain effective throughout the duration of this Agreement, and any extension thereof. Copies of any and all agreements with respect to Rights and Permits shall be made available to the other Party upon request. If confidentiality obligations under such agreements preclude provision of the entire document, summaries of the substantive provisions thereof will be provided. In the event TDS is unable to resolve any issue with respect to its Rights or Permits in a manner reasonably acceptable to SU, SU may, after providing TDS thirty (30) days prior written notice, attempt to resolve the issue directly with the granter of such Rights.

ARTICLE 14: RELOCATION OF CABLE

14.1 If TDS is required to relocate or replace the TDS's Cable (shown on **Attachment A** in red) or any of the appurtenant facilities used or required in providing the SU IRU Fibers, and the gross cost (excluding reimbursements) of TDS's relocation or replacement exceeds $10,000 per occurrence, then, so long as such work is not necessitated by a

breach of TDS's obligations, SU shall reimburse TDS for SU's Proportionate Share of such relocation or replacement costs in excess of $10,000, including, without limitation, placement or relocation labor, fiber acquisition, splicing, and testing. In the event that a third party reimbursed TDS for all or a portion of the cost to perform such relocation work, then this reimbursement amount shall reduce on a dollar-for-dollar basis the aggregate amount of costs deemed to have been spent by TDS. TDS shall deliver to SU updated as-built drawings and Documentation with respect to any relocated portion of the Cable not later than ninety (90) days following such relocation.

14.2 If TDS is required to relocate the TDS Cable or any of the appurtenant facilities used or required in providing the SU IRU Fibers in any of the utility-specific Segments that would not have been built but for the SU's request (shown on **Attachment A** in blue), SU shall reimburse TDS for all relocation costs TDS incurs if, at the time of the relocation, SU is the only user of the specific Segment. If however, at the time of relocation, SU is not the only user of the specific Segment, SU shall pay its Proportionate Share of any relocation costs in excess of $10,000, including, without limitation, placement or relocation labor, fiber acquisition, splicing, and testing. In the event that a third party reimbursed TDS for all or a portion of the cost to perform such relocation work, this reimbursement amount shall reduce on a dollar-for-dollar basis the aggregate amount of costs deemed to have been spent by TDS. TDS shall deliver to SU updated as-built drawings and Documentation with respect to any relocated portion of the Cable not later than ninety (90) days following such relocation.

14.3 TDS shall give SU sixty (60) days' prior notice of any such relocation, if possible, and shall have the obligation to proceed with such relocation, including, but not limited to, the right to determine the extent of, the timing of, and methods to use for such relocation; provided that any such relocated Cable and Fibers shall be constructed and tested in accordance with the specifications and requirements set forth in this Agreement. Acceptance of the relocated SU IRU Fibers shall be in accordance with Article 5 of this Agreement. In addition, TDS shall use reasonable efforts to ensure relocation shall not result in an adverse change to the operations, performance, or connection points with SU's facilities, or end points of the applicable Cable.

14.4 SU has the right to review TDS's relocation plans (14) days prior to any relocation and has the right to have, subject to the protocols of the Rights-of-Way agreements, a representative present at the time TDS relocates the Cable that contains the SU IRU Fibers.

ARTICLE 15: CONDEMNATION

15.1 In the event any portion of the TDS Cable or the Rights-of-Way in or upon which it has been installed, become the subject of a condemnation proceeding by any governmental agency or other party cloaked with the power of eminent domain for public purpose or use, then and in such event, it is agreed that TDS shall be entitled to pursue an award in such proceedings and shall be solely entitled to any award arising therefrom.

15.2 Upon its receipt of a formal notice of condemnation or taking, TDS shall notify SU immediately of any condemnation proceeding filed against the TDS Cable, including the

SU IRU Fibers, or the Rights-of-Way in or upon which the SU IRU Fibers have been installed. TDS shall also notify SU of any similar threatened condemnation proceeding and agrees not to sell the Cable or release Rights-of-Way to such acquiring agency, authority or other party in lieu of condemnation without the prior written consent of SU, which consent shall not be unreasonably conditioned, delayed, or denied.

15.3 It is expressly recognized and understood by SU that relocation costs resulting from any such condemnation proceeding may not be reimbursed by the condemning authority and SU shall pay its Proportionate Share of all costs associated with the relocation of the SU IRU Fibers in excess of such costs which were reimbursed by the condemning authority.

ARTICLE 16: ABANDONMENT

16.1 Should SU decide to abandon all or part of the SU IRU Fibers, it may do so by informing TDS in writing, such abandonment being made at no cost to either Party. SU shall remove its equipment and electronics within thirty (30) days of such notification of abandonment by SU, failing which TDS may remove same at SU's cost payable within thirty (30) days of SU's receipt of an invoice therefor. At the time of abandonment, SU shall have no further rights or obligations with respect to the SU IRU Fibers, except as specifically set forth in this Agreement.

ARTICLE 17: DEFAULT

17.1 Neither Party shall be in default under this Agreement unless and until the other Party shall have given the defaulting Party written notice of such default and the defaulting Party shall have failed to cure the default within thirty (30) days after receipt of such notice; provided, however, that where a default cannot be reasonably cured within the 30-day period and where the defaulting Party shall promptly proceed to cure the default with due diligence, the time for curing the default shall be extended for a period of up to ninety (90) days from the date of receipt of the default notice.

17.2 Upon the failure of the defaulting Party to timely cure any default after notice thereof from the non-defaulting Party, the non-defaulting Party may take any action it determines, in its reasonable discretion, to be necessary to correct the default, and/or pursue any legal remedies it may have under applicable law or principles of equity relating to the breach.

17.3 The Parties acknowledge and agree that irreparable damage may occur in the event that any of the provisions of this Agreement are not performed in accordance with their specific terms or are otherwise breached. It is accordingly agreed that each Party shall be entitled to seek injunctive or similar preliminary relief to prevent breaches or cure defaults of the provisions of this Agreement by the other and to enforce specifically the terms and provisions hereof, this being in addition to any other remedy to which the Party may be entitled by law or equity.

ARTICLE 18: NOTICES

18.1 Unless otherwise provided herein, all notices and communications concerning this Agreement shall be in writing and addressed as follows:

If to TDS:
TDS Metrocom, LLC
Attention: Vice President Field Services
525 Junction Road
Madison, WI 53717

WITH A COPY TO:
TDS TELECOMMUNICATIONS LLC
525 Junction Road
Madison, WI 53717
Attention: Legal Department

WITH A COPY TO:
Sidley Austin
Attn: Stephen P. Fitzell
One South Dearborn
Chicago, IL 60603

If to Stoughton Utilities:
Utility Director
Stoughton Utilities
600 South Fourth Street
Stoughton, WI 53589

WITH A COPY TO:
Anita T. Gallucci
Boardman & Clark LLP
1 South Pinckney Street
P.O. Box 0927
Madison, WI 53701-0927

18.2 Unless otherwise provided herein, notices shall be sent by certified U.S. Mail, return receipt requested, or by commercial overnight delivery service which provides acknowledgement of delivery, and shall be deemed delivered: if sent by U.S. Mail, five (5) days after deposit; if sent by commercial overnight delivery service, upon verification of receipt.

ARTICLE 19: ASSIGNMENT, SUCCESSION

19.1 SU shall not assign this Agreement to any other party without the prior written consent of TDS.

19.2 Except as provided in this Article 19, TDS shall not assign this Agreement to any other party without the prior written consent of SU, provided, however, that without such consent, TDS shall have the right to assign or otherwise transfer this Agreement, in whole or in part, to any parent, subsidiary, or affiliate of TDS or to any person, firm or corporation which shall control, be under the control of, or be under common control with TDS, or any corporation or entity into which TDS, or a subsidiary of TDS, may be merged or consolidated or which purchases all or substantially all of the assets of TDS or a subsidiary of TDS.

19.3 Subject to the provisions of this Article 19, each of the Parties' respective rights and obligations hereunder shall be binding upon and shall inure to the benefit of the Parties and each of their respective permitted successors and assigns.

ARTICLE 20: GOVERNING LAW

20.1 This Agreement shall be interpreted and construed in accordance with the laws of the state of Wisconsin, without regard to its conflict of laws principles.

ARTICLE 21: INDEPENDENT CONTRACTOR

21.1 The performance by TDS and/or SU of all duties and obligations under this Agreement shall be as independent contractors and not as agents of the other Party, and no persons employed or utilized by a performing Party shall be considered the employees or agents of the other. Neither Party shall have the authority to enter into any agreement purporting to bind the other without its specific written authorization. The Parties agree that this Agreement does not create a partnership between, or a joint venture of, TDS and SU.

ARTICLE 22: DISPUTE RESOLUTION

22.1 It is the intent of SU and TDS that any disputes which may arise between them, or between the employees of each of them, be resolved as quickly as possible. Quick resolution may, in certain circumstances, involve immediate decisions made by the Parties' representatives. For that purpose, TDS and SU shall each designate, by separate letter, representatives as points of contact and decision making with respect to the obligations and rights of the Parties, such letters to be furnished by each Party to the other within thirty (30) days from the date of the last signature on this Agreement. Any disputed issues arising during the term of this Agreement shall in all instances be initially referred to the Parties' designated representatives. The Parties' designated representatives shall use reasonable efforts to reach a mutually agreeable resolution of the disputed issue, in writing, within two (2) weeks of such referral, or whatever longer or shorter period to which the Parties may agree. Either Party may modify the designated representative upon written notice to the other Party.

22.2 In the event the Parties' representatives are unable to resolve any claims or disputes arising under this Agreement within the applicable time period, either Party is free to pursue any remedies available to it in law or equity.

ARTICLE 23: LIENS

23.1 In the event the SU IRU Fibers become subject to any mechanics', artisans', or materialmen's lien, or other encumbrance chargeable to or through TDS that interferes with the SU IRU Fibers or jeopardizes SU's use of the SU IRU Fibers, TDS shall promptly cause such lien or encumbrance to be discharged and released of record (by payment, posting of bond, court deposit, or other means) without cost to SU and shall indemnify SU against all costs and expenses (including attorney's fees) incurred in discharging and releasing such lien or encumbrance; provided, however, that if any such lien or encumbrance is not so discharged and released within thirty (30) days after written notice by SU to TDS, then SU may pay or secure the release or discharge thereof at the expense of TDS. TDS shall reimburse SU for such payments within thirty (30) days of its receipt of an invoice therefor.

23.2 TDS agrees and acknowledges that it has no right to use any of the SU IRU Fibers included in the TDS Cable. TDS shall obtain from any entity in favor of which TDS, in its discretion, grants after the date of this Agreement a security interest or lien on all or part of the TDS Cable, a written nondisturbance and subordination agreement in form and substance reasonably satisfactory to SU. The nondisturbance and subordination agreement shall be written to the effect that such lienholder acknowledges SU's interest and rights in the SU IRU Fibers and the IRU granted by this Agreement and agrees that the same shall not be diminished, disturbed, impaired, or interfered with in any adverse respect by such lienholder.

23.3 SU agrees and acknowledges that it has no right to use any of the Fibers, other than the SU IRU Fibers, included in the TDS Cable or otherwise incorporated in TDS's Fiber System and that SU shall keep any and all of TDS's Fiber System free from any liens, rights, or claims of any third party attributable to SU.

ARTICLE 24: MISCELLANEOUS

24.1 The headings contained in this Agreement are strictly for convenience and shall not in any way be construed as amplifying or limiting any of the terms, provisions, or conditions of this Agreement.

24.2 In construction of this Agreement, words used in the singular shall include the plural and the plural the singular, and "or" is used in the inclusive sense, in all cases where such meanings would be appropriate.

24.3 No provision of this Agreement shall be interpreted to require any unlawful action by either Party. If any section or clause of this Agreement is held to be invalid or unenforceable, then the meaning of that section or clause shall be construed so as to render it enforceable to the extent feasible. If no feasible interpretation would save the section or clause, it shall be severed from this Agreement with respect to the matter in question, and the remainder of the Agreement shall remain in full force and effect. However, in the event such a section or clause is an essential element of the Agreement, the Parties shall promptly negotiate a replacement section or clause that will achieve the intent of such unenforceable section or clause to the extent permitted by law.

24.4 This Agreement may be amended only by a written instrument executed by the Party against whom enforcement of the modification is sought.

24.5 No failure to exercise and no delay in exercising, on the part of either Party, any right, power, or privilege hereunder shall operate as a waiver thereof, except as expressly provided in this Agreement. Any waiver by either Party of a breach of any provision of this Agreement shall not be deemed to be a waiver of any other or subsequent breach and shall not be construed to be a modification of the terms of this Agreement unless and until agreed to in writing by both Parties.

24.6 In the event of a conflict between the provisions of this Agreement and those of **Exhibit A-1**, the provisions of **Exhibit A-1** shall prevail and the Agreement will be corrected accordingly. If there is a conflict or difference between this Agreement and other exhibits, this Agreement shall prevail.

24.7 This Agreement has been fully negotiated between and jointly drafted by the Parties.

24.8 All actions, activities, consents, approvals, and other undertakings of the Parties in this Agreement shall be performed in a reasonable and timely manner.

24.9 Unless expressly defined herein, words having well known technical or trade meanings shall be so construed.

ARTICLE 25: COUNTERPARTS

25.1 This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all such counterparts shall together constitute one and the same instrument.

ARTICLE 26: ENTIRE AGREEMENT

26.1 This Agreement, and any exhibits or attachments referenced in and attached hereto or to be attached hereto, constitute the entire agreement between the Parties with respect to the subject matter hereof and supersede any and all prior negotiations, understandings and agreements with respect hereto, whether oral or written. For the sake of clarity, the exhibits and attachments hereto are incorporated into and form part of this Agreement.

[SIGNATURE PAGE FOLLOWS]

City of Stoughton, Wisconsin, acting through Stoughton Utilities	**TDS Metrocom, LLC**
Signed:_____	Signed:_____
By: Jill Weiss	By:_____
Its: Utility Director	Its: Vice President of Field Services
Date:_____	Date:_____

ATTACHMENTS/EXHIBITS:

Attachment A: Stoughton Utility Locations - Ring
Exhibit A-1: SU IRU Fibers in TDS Cable: Description of Initial Segments
Exhibit B: Acceptance Test Plan
Exhibit C: Form of Acceptance/Rejection Notice
Exhibit D: Maintenance and Repair Procedures

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ATTACHMENT A

CONFIDENTIAL
Not For Public Disclosure

EXHIBIT A-1

SU IRU FIBERS IN TDS CABLE:
DESCRIPTION OF INITIAL SEGMENTS

SegmentID #	FROM	TO	ROUTE LENGTH IN FEET	# FIBER STRANDS
1	Administration Office - 600 S 4th St	Well #5 - 1320 South St	7,037'	4
2	Well #5 - 1320 South St	Well #7 - 2001 Roby Rd	13,538'	4
3	Well #7 - 2001 Roby Rd	Tower II - 1430 Furseth Rd	3024'	4
4	Tower II - 1430 Furseth Rd	Well #4 - 921 N Van Buren St	4,304'	4
5	Well #4 - 921 N Van Buren St	Tower III - 1273 Racetrack Rd	14,794’	4
6	Tower III - 1273 Racetrack Rd	Well #6 - 1215 E Academy St	5,036'	4
7	Well #6 - 1215 E Academy St	Wastewater Facility - 700 Mandt Pkwy	7,785'	4
8	Wastewater Facility - 700 Mandt Pkwy	Administration Office - 600 S 4th St	2,858'	4
9	West Substation - 3221 McComb Rd	Well #5 - 1320 South St	7,743'	2
10	North Substation - 302 County Hwy B	Well #4 - 921 N Van Buren St	7,964'	2
11	East Substation - 1200 E South St	Well #6 - 1215 E Academy St	2,078'	2
12	South Substation - 1067 Taylor Ln	Administration Office - 600 S 4th St	5,744'	2
13	Nordic Ridge Lift Station - 2015 Korgen Dr	Well #5 - 1320 South St	5,688'	2
14	Oakridge Lift Station - 1608 Oakridge Way	Well #7 - 2001 Roby Rd	3,620'	2
15	Vennevoll Lift Station - 501 Amundson Pkwy	Tower III - 1273 Racetrack Rd	6,832'	2
16	Eastwood Lift Station - 1701 Eastwood Dr	Tower III - 1273 Racetrack Rd	4,580’	2
17	Stonecrest Lift Station - 816 Haskell Ct	Tower III - 1273 Racetrack Rd	3,241'	2
18	Eight Street Lift Station - 624 S 8th St	Administration Office - 600 S 4th St	2,316'	2

Total Footage = 108,182

Estimated Completion Date: October 1, 2021

Initial Term: 20 years beginning on the IRU Effective Date (see Article 3 of the Agreement)

Number of SU IRU Fibers per Segment: 2 to 4 (as indicated above)

IRU Fee Payment: One-time payment of up to $180,000 or actual cost of construction, whichever is less (see Section 1.4 of the Agreement)

Annual Rights-of-Way Fees: None.

Annual Maintenance Fee: $8,000 (see Section 4.4 of the Agreement)

City of Stoughton, acting through Stoughton Utilities	**TDS Metrocom, LLC**
Signed:_____	Signed:_____
By: Jill Weiss	By:_____
Its: Utility Director	Its: Vice President of Field Services
Date:_____	Date:_____

EXHIBIT B

ACCEPTANCE TEST PLAN

1.0 TDS will prepare and provide SU with an Acceptance Test Plan ("**ATP**"), prior to conducting actual field tests of the SU IRU Fibers.

2.0 Testing will include, but not be limited to, the following:

(a) Bi-directional OTDR tests for 1550nm wavelength
Acceptance criteria: bi-directional splice test average not-to-exceed 0.15 dB with no single direction test greater than 0.25 dB

(b) Span tests with a power meter at 1550 nm wavelength
Acceptance criteria: The span test shall not exceed the following calculated loss for any given span:

(0.3 dB/km)(d) + (0.15 dB)(n) = Total Allowable Span Attenuation Loss

d = Fiber distance in kilometers
n = total number of splices in the span, including pigtails

3.0 TDS will submit a tentative schedule for the ATP to SU at least thirty (30) days prior to completion of construction and installation of any Cable which contains SU IRU Fibers. The ATP will be performed on the entire Cable Segment upon completion of construction and installation.

4.0 SU shall have the option to have one or more representatives present to observe the testing undertaken by TDS as part of the ATP.

EXHIBIT C

FORM OF ACCEPTANCE/REJECTION NOTICE

Check one box:

☐ **Fiber Accepted (fill in acceptance statement below):**

Pursuant to Article 5 of the Fiber Optic Agreement and Grant of IRU between City of Stoughton, Wisconsin ("SU") and TDS Metrocom LLC, ("TDS") dated March _____, 2021, delivery of _____ (__) Fibers was made by TDS to SU for the following Segment(s) listed on **Exhibit A-__**: Segment ID Numbers: _____.

☐ **Fiber Rejected (fill in reason statement below):**

Reason for Rejection:

Signature: _____

Name: _____

Title: _____

City of Stoughton, Wisconsin,
acting through Stoughton Utilities

Date: _____

EXHIBIT D

MAINTENANCE AND REPAIR PROCEDURES

1.0 TROUBLE REPORTING

Prior to calling a trouble ticket, the SU must first:

- Verify electric power to each site
- Verify power to the individual equipment (optical switch) at each site for the link in question (power cord, power supply, battery backup / UPS Rack Power Distribution Unit) if applicable
- Visually verify the link is actually down (no link light on SFP's / optics)
- Properly clean fiber optic connectors and ports by utilizing appropriate fiber optic connector/port cleaning tools
- Reseat the associated fiber optic jumper connectors and fiber optic ports on either end of the circuit to try and re-establish the link
- Reseat SFP optics / swap SFP optics with new spare SFP's on either end of the circuit to verify that it's not a failed customer-owned SFP
- Verify the switch ports configuration through Command Line Interface (CLI)
- Determine if switch ports are Up/Down or Down/Down. If Down/Down, re-enable the switch port using the CLI

Upon TDS's Network Management Center receiving a trouble report from SU, TDS will dispatch qualified personnel to the location of the outage within 4 hours. At the same time the call will be escalated to TDS's Field Operations Manager. TDS's Field Operations Manager will respond with on call qualified personnel to isolate the problem. The problem may then be escalated as necessary for notification.

2.0 ESCALATION LISTS

<u>SU Escalation List</u>

Jill Weiss
Utility Director
608-877-7423
JWeiss@stoughtonutilities.com

Brian Hoops
Asst. Utility Director
608-877-7412
BHoops@stoughtonutilities.com

TDS Escalation List

TDS Network Management Center
888-790-1216

Glen Campbell
(608) 848-2586
Glen.Campbell@tdstelecom.com

Michael Schneider
(608) 828-9451
Michael.Schneider@tdstelecom.com

3.0 ROUTINE MAINTENANCE STANDARDS

Maintenance of the fiber plant should be completed on a regular recurring basis and documented. Properly installed fiber plant normally needs minimal routine maintenance. Most hazards to fiber plant are external in nature, such as dig ups, pole hits, gun shots, etc. Most destructive events are detected immediately and corrected with plant restoration. A well implemented maintenance plan will permit correction of marginal plant conditions that might otherwise become restoration events. TDS's Network Management Center should be notified in advance of any scheduled Outside Plant facilities (OSP) maintenance activity reported or planned:

TDS Network Management Center
888-790-1216

4.0 CABLE ROUTE SURVEILLANCE

OSP are periodically inspected by field personnel. During this periodic inspection the Cable route is driven/walked to inspect for discrepancies that may affect cable integrity. Any discrepancies found are documented and forwarded into the Outside Plant Maintenance desk for correction and repair as necessary. The following are some of the OSP items that will be inspected:

- Cable route integrity (e.g.: erosion)
- Condition of poles, pedestals, risers, lashing wire, route markers, and signs
- Clearance of aerial facilities
- Construction activity in the area near the cable

5.0 PLANT LOCATION REQUESTS

All facilities associated with this agreement are located in Wisconsin, which has a statewide "one call" agency for excavators to request and notify utilities of digging in the vicinity of TDS's facilities. TDS will subscribe to these services and follow the guidelines and laws applicable to that state including the marking of their facilities within the required time of receipt of request. TDS will also take action to ensure that the excavator is aware of and protects the facility during the excavation as required.

6.0 PLANT RELOCATION REQUESTS

Plant relocation requests will be submitted to the manager of field operations to be reviewed for applicable resolution. Requests should be responded to and scheduled as required taking into consideration the scope of work and the urgency of the activity.