

INTERLOCAL AGREEMENT

BETWEEN

PETRICHOR BROADBAND, LLC

a local government-owned Washington limited liability company

AND

THE PORTS OF BELLINGHAM, KALAMA, PASCO, RIDGEFIELD, AND SKAGIT
COUNTY,
each a Washington Public Port

AND

THE PORT OF WHITMAN COUNTY,
a Washington Public Port

Dated

as of

13-Jan-2020

EFFECTIVE DATE: January 1, 2020

INTERLOCAL AGREEMENT

BETWEEN

PETRICHOR BROADBAND, LLC

AND

**THE PORTS OF BELLINGHAM, KALAMA, PASCO, RIDGEFIELD, AND SKAGIT
COUNTY,
each a Washington Public Port**

AND

THE PORT OF WHITMAN COUNTY

THIS INTERLOCAL AGREEMENT (this "Agreement") is made and entered into effective as of _____, by and between PETRICHOR BROADBAND, LLC a local government-owned Washington limited liability company ("PETRICHOR") and the Port of Whitman County, a Washington port district (the "POW") established pursuant to Title 53 RCW (collectively, the "Parties") and the Port of Bellingham, the Port of Kalama, the Port of Pasco, the Port of Ridgefield, and the Port of Skagit County (Collectively the "Other Ports").

RECITALS

1. **PETRICHOR** is a "manager managed" limited liability company whose members are the Ports of Skagit County, Ridgefield, Kalama, Whitman County, Pasco, and Bellingham, each a Washington Port District organized and existing pursuant to Title 53 RCW. The affairs of PETRICHOR are governed by an Interlocal Operating Agreement (the "OA") which is appended hereto. The OA names the **POW** as the initial manager of **PETRICHOR**.
2. The Parties recognize that the **POW** has undertaken the development of, and currently operates, a dark fiber system.
3. The Parties further recognize that to act as Manager of **PETRICHOR**, will require the **POW** to devote the time of certain of its employees to the management of **PETRICHOR's** affairs for which the **POW** will be entitled to a management fee and which brings value to **PETRICHOR** for which the **POW** should be compensated.

4. The Parties are entering into this Agreement under the authority of the Interlocal Cooperation Act, specifically RCW 39.34.030, to arrange for the **Management Services** of **PETRICHOR**'s affairs by the **POW** and **Telecommunications Management** of the **POW**'s **Telecommunications Facilities** and the **Telecommunications Facilities** of others by **PETRICHOR**, consistent with the State of Washington's legislative policy as set forth in RCW 53.08.370.
5. The Parties also recognize: (i) the value of, and will pursue where it is deemed appropriate; (ii) development of state-wide, regional, and local open access dark fiber systems; (iii) a consistent approach to technologies and business models throughout the state, subject to local and regional conditions; and (iv) public-private partnerships that advance the goals and objectives of **PETRICHOR**, its Members, and other port districts.
6. In adopting this Agreement, the Parties hereby also adopt, and agree to, the Recitals and the facts set forth herein.

ARTICLE I – DEFINITIONS

1. Incorporation of OA Definitions. The **bold face** terms used in the remainder of this Agreement shall have the meanings set forth in Article I – “Definitions” set forth in the OA (unless otherwise expressly provided herein).
2. Additional Terms. The following terms shall have the meanings set forth below:
 - a. “Management Services” shall mean the management functions delegated to the **Manager** in the OA and as subsequently expanded, narrowed, or modified by the **Executive Council** of **PETRICHOR**.
 - b. “Telecommunications Management” shall mean the planning, oversight of construction, grant application preparation, and routine operation of **Telecommunications Facilities** provided by Washington Ports or other entities and/or the provision of assistance to such ports or other entities as they undertake such function.
 - c. “POW” shall mean the Port of Whitman County, contrary to the OA, Subsection 1.22.

ARTICLE II – COMMITMENTS

1. **POW Commitments.** The **POW** commits to:
 - a. Perform all management functions delegated to the **Manager** in the OA and as subsequently expanded, narrowed, or modified by the **Executive Council** of **PETRICHOR**. Additionally, the **POW** shall carry out all tasks incidental thereto to assure the efficient operation of **PETRICHOR** and as required by law for an entity owned by Washington port districts.
 - b. Utilize **PETRICHOR** for the **Telecommunications Management** pursuant to **PETRICHOR's** standard **Telecommunications Management** contract, which shall include provision for a minimum period of three (3) years following the effective date hereof, with payment for the **Telecommunications Management** of **POW's** Broadband system.
 - c. Transfer to **PETRICHOR** immediately upon the effective date hereof the **POW's** network management software license.
 - d. Actively pursue opportunities to work with port districts to plan, develop, and operate on their behalf, local port-owned **Telecommunications Facilities**. Such work shall be performed pursuant to written agreements and for such fees as shall be set by the Manager.
 - e. Investigate and bring to the attention of the **Advisory Committee** opportunities to improve broadband connectivity statewide through facilitating opportunities with private companies or through construction of physical infrastructure and to pursue such opportunities subject to final approval of the **Executive Council**.
 - f. Engage with public and private entities involved in **Telecommunications Services** or operating **Telecommunications Facilities** and stay apprised of technical advances, the economic environment and governmental policies that affect the business affairs and legal compliance of **PETRICHOR**.
 - g. Work with WPPA and governmental officials to develop state policies that support ports' **Telecommunications** efforts.
 - h. The **POW** shall be exclusively responsible, and shall hold harmless and indemnify **PETRICHOR**, for payment of the employer's share of all federal and state payroll taxes and assessments, all benefits and PTO accruals for its employees, the withholding and payment of federal taxes for its employees and filing of all employer federal and state employment documentation, and tax forms.

- i. Carry out all the foregoing commitments in a highly professional, prompt, and diligent manner and in full compliance with law, particularly all applicable provisions contained in Chapters 53.08, 39.34, 42.20, 42.23, 42.30, and 42.56 RCW.

2. **PETRICHOR Commitments.** **PETRICHOR** commits to:

- a. Keep the **Manager** informed as to the pertinent business information of **PETRICHOR** to enable the **Manager** to carry out its commitments.
- b. Provide staff for, and fully participate in, the **Advisory Committee** and the **Executive Council** and carry out the duties of each in a timely manner to support the efforts of the **Manager**.
- c. Reimburse the **POW** in an amount equal to three quarters (3/4) of the following: full salary, employer's share of all Federal and State payroll taxes and assessments, and cost of benefits (e.g. insurance, retirement, and as used paid time-off) for the following **POW** employees who shall conduct the **POW's** commitments: Executive Director and Chief Operations Officer. Such reimbursement shall be paid within thirty (30) days of invoice.
- d. Provide as Partial Compensation to the **POW** for its agreement to utilize **PETRICHOR** for its **Telecommunications Management** the following:
 - i. A credit for a Two Hundred Thousand and no/100 Dollars (\$200,000.00) capital contribution ("**POW Credit**"); and
 - ii. A value payment in the total amount of Four Hundred Seventy-Two Thousand Four Hundred Eighty-Seven and 85/100 Dollars (\$472,487.85) divided equally over three (3) years.
 - iii. A payment in the amount of Twenty-Five Thousand and no/100 Dollars (\$25,000.00) for transfer of the **POW's** network management resources to **PETRICHOR** immediately upon the effective date hereof, payable within thirty (30) days of invoice.
 - iv. The Parties agree that the values assigned in this Subsection, Subsection 3, and to the **PETRICHOR's** commitments are fair market valuations, have been negotiated at "arm's length" and constitute adequate, reasonable and sufficient consideration for said commitments.

3. Other Ports' Commitments. The Other Ports each commit to:
 - a. Recognize that the **POW** value payment will deprive the **POW** of a share of net revenue generated by **PETRICHOR** equal to Seventy-Eight Thousand Seven Hundred Forty-Seven and 98/100 Dollars (\$78,747.98).
 - b. Each pay to the **POW**, no later than January 31, 2020, the amount of Fifteen Thousand Seven Hundred Forty-Nine and 60/100 Dollars (\$15,749.60) which, when combined with the Partial Compensation, shall constitute final and full compensation to the **POW** for its commitments.

ARTICLE III – GENERAL PROVISIONS

1. Commencement, Term and Termination.
 - a. Commencement. This Agreement shall commence on January 1, 2020 (the "Effective Date").
 - b. Term. The term of this Agreement shall be three (3) years and shall renew for successive three-year periods unless any Party provides notice no less than one hundred eighty (180) days prior to end of any term of its intention to terminate the Agreement at the end of the then current term.
 - c. Termination.
 - i. The foregoing notwithstanding, either Party may terminate this Agreement based on material breach of the Agreement, which breach goes uncured or for which a reasonable cure has not commenced with thirty (30) days of notice of the breach given to the putatively breaching party.
 - ii. After the third anniversary of the Effective Date, either Party may terminate this Agreement for convenience upon one hundred eighty (180) days' notice to the other Party.
2. Administration: The following individuals are designated as representatives of the respective parties. The representatives shall be responsible for administration of this Agreement and for coordinating and monitoring performance under this Agreement. In the event such representatives are changed, the party making the change shall notify the other party:

The **POW**'s representative shall be JOSEPH R. POIRE.

PETRICHOR's representative shall be MARK WILSON.

Notices and communications between the parties pursuant hereto shall be addressed as follows:

TO THE POW:

JOSEPH R. POIRE
Its: Executive Director
302 N. Mill Street
Colfax, WA 99111
(509) 397-3791
JoePoire@PortWhitman.com

TO PETRICHOR:

MARK WILSON
Its: Executive Council Chair
110 W. Marine Drive
Kalama, WA 98625
(360) 673-2325
MarkWilson@PortofKalama.com

Any notice addressed to the postal address of the recipient, as set forth above, shall be deemed delivered and received the third day thereafter, any email message shall be deemed delivered upon transmission. The parties shall be deemed to have received such notices at the addresses and telephone numbers listed above, unless the party(ies) shall have given written notice to the other party of any change(s).

3. Non-Entity Status and Assets. There shall be no separate entity created hereby and no ownership of real, personal or intangible property of other assets of any kind.
4. Mutual Indemnity.
 - a. The **POW** shall indemnify **PETRICHOR** for any claim of loss by a third party for personal injury or property damage to the extent such loss resulted from an act or omission of the **POW**, its employees or its agent. Such indemnity obligation includes the amount of any judgment in favor of such a third party and the cost of defense of any claim, including attorney fees.
 - b. **PETRICHOR** shall indemnify the **POW** for any claim of loss by a third party for personal injury or property damage to the extent such loss resulted from an act or omission of **PETRICHOR**, its employees or its agent. Such indemnity obligation includes the amount of any judgment in favor of such a third party and the cost of defense of any claim, including attorney fees.
 - c. Each party shall, upon learning of any third-party claim or potential third-party claim, give written notice of such claim or potential claim to the other party.
 - d. No party shall admit liability of the other party nor settle or compromise any claim in a manner requiring contribution from or imposing liability on the other party without the other party's prior written approval.
 - e. No Party shall assume or incur any liability solely by virtue of entering into this Agreement.


5. Relationship of Parties. The OA notwithstanding, the Parties are not acting as partners or as joint venturers under the terms of this Agreement. Neither party assumes the liabilities of the other party related to the activities contemplated hereby. This Agreement shall not be construed to confer any benefit on any person or entity not a party hereto.
6. Integration/Amendment. This Agreement constitutes the entire understanding between the parties and any oral agreements or representations shall be disregarded. Any amendments to this Agreement shall become effective only upon mutual written agreement of the parties.
7. Interpretation. No inference or presumption shall be drawn if a Party or its attorney prepared and/or drafted this Agreement; it shall be conclusively presumed that the Parties participated equally in its preparation and/or drafting. Each Party was represented by counsel in the preparation of this Agreement. Should any provision of this Agreement be held by a court to be invalid or unenforceable, the other provisions shall remain in full force and effect.
8. Force Majeure. If either Party is rendered unable, wholly or in part, by force majeure or any other cause of any kind not reasonably within its control to perform or comply with any obligation or condition of this Agreement upon giving written notice to the other Party, such obligation or condition shall be suspended during the continuance of the inability so caused and such Party shall be relieved of any liability during such period. The term force majeure shall include, without limitation by the following enumeration, acts of God, federal, state, county, or municipal orders, regulations or directives of any governmental authority or persons purporting to act therefor, or when the supply of product or any facility of production, manufacture/storage, transportation, distribution or delivery contemplated by either party is prevented or delayed by terrorist or enemy attack, riots, other disturbances, earthquakes, hurricanes, strikes, or lockouts of any class of workers, or stoppage of labor, or damage to piers or essential equipment, floods, fire, explosion, or destruction from any cause of any character either similar or dissimilar to the foregoing and reasonably beyond the control of the Party failing to perform.
9. Signing/Recording. This Agreement may be executed in counterparts and shall be posted by both Parties on each party's respective web site or recorded with the County Auditor in the county in which is a Party's principal place of business.
10. Dispute Resolution. In the event of a dispute between **PETRICHOR** and **POW** regarding the rights, duties, or liabilities of the parties under this Agreement, or the delivery of services under this Agreement, the Port Commissioners and **PETRICHOR** Executive Council shall designate representatives who shall review such dispute and discuss options for resolution.

If any dispute, controversy or claim arising out of or relating to this Agreement or the alleged breach of such Agreement cannot be resolved by the parties, such dispute shall be submitted to binding arbitration in accordance with the rules and procedures of the Commercial Rules and Expedited Procedures of the American Arbitration Association, with appeal limited to that set forth in Chapter 7.04 RCW. The judgment or award rendered by the arbitrator may be entered and enforced in Whitman County Superior Court.

In any arbitration or suit to compel arbitration or to enforce an arbitrator's award, the prevailing party shall receive an award of its reasonable attorney fees and costs, including those incurred on appeal.

THIS AGREEMENT, HAVING BEEN APPROVED BY THE COMMISSIONERS OF THE PORT OF WHITMAN COUNTY AND THE PETRICHOR BROADBAND, LLC EXECUTIVE COUNCIL, IS EXECUTED BY THE PARTIES AS FOLLOWS:

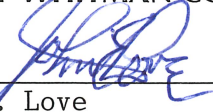
PETRICHOR BROADBAND, LLC

By: 
Mark Wilson, Chair
Petrichor Broadband LLC Executive Council
Date: 13-Jan-2020

ATTEST:

 1/29/20
Patricia H. Botsford-Martin, Secretary,
Petrichor Broadband, LLC Executive Council

PORT OF WHITMAN COUNTY

By: 
John E. Love
Commission President
Date: 2-24-2020

Appendix: PETRICHOR BROADBAND, LLC *Interlocal Operating Agreement*

