

<b>Utility Construction Agreement Work by WSDOT — Shared Cost</b>			Utility Name & Address			
Agreement Number <b>UT</b>	Region	Control Section	Project Title/Location			
State Route		Mileposts <b>From                      to</b>				
Estimated Agreement Amount <b>\$</b>	Advance Payment Amount <b>\$</b>	State Share <b>\$</b>		Utility Share <b>\$</b>		
			%		%	

This Utility Construction Agreement is entered into between the State of Washington Department of Transportation, hereinafter “WSDOT” and the above-named Utility, hereinafter the “Utility”, collectively the “Parties” and individually the “Party”.

**Recitals**

1. WSDOT is planning the construction or improvement of the State Route as shown above for the identified WSDOT Project, and in connection therewith, it is necessary to remove and/or relocate and/or construct certain Utility facilities (Work).
2. WSDOT is responsible for the cost of the Work affecting the Utility’s facilities located pursuant to a documented ownership of and/or interest in real property, such as an easement, fee title, or court finding of prescriptive right, which is impacted by WSDOT Project.
3. The Work shall be defined as all materials, equipment, labor, contract administration and any other effort required to perform the relocation, construction, and/or removal of the Utility’s facilities.
4. The Work includes Betterments; Relocation of Facilities with Property Rights; Facilities without Property Rights; Installation of New Facilities; and/or Removal of Existing Facilities from WSDOT right of way.
5. The Utility is responsible for (1) the cost of the Work for Utility facilities located without a documented ownership of and/or interest in real property, such as being located pursuant to a franchise, a permit, or undocumented permission, (2) all betterments, and (3) new facilities.
6. It is deemed to be in the best public interest for WSDOT to include the Work in WSDOT’s Project.

Now therefore, pursuant to RCW 47.01.210 and chapter 47.44 RCW, the above recitals that are incorporated herein as if fully set forth below, and in consideration of the terms, conditions, covenants, and performances contained herein, as well as the attached Exhibits which are incorporated and made a part hereof,

**It Is Mutually Agreed As Follows:**

**1. Plans, Specifications and Bids**

- 1.1 Program Guide: Utility Relocation and Accommodation on Federal Aid Highway Projects shall determine and establish the definitions and applicable standards and payments under this Agreement. By this reference this document is adopted and made a part of this Agreement as if fully contained herein.

- 1.2 **Betterment:** A betterment is any improvement to the Utility's facilities not required by code, regulation, standard industry practice, or any other applicable regulation. If any of the Work constitutes a betterment as defined in the Program Guide: *Utility Relocation and Accommodation on Federal Aid Highway Projects*, the Utility is solely responsible for the costs of such improvement.
- 1.3 **Accrued Depreciation:** Accrued depreciation may be applied to any of the Utility's major facilities, such as a building, pump station, power plant, etc. Accrued depreciation shall not apply to the Utility's primary facilities, such as pipelines, conductors, poles, cable, conduit, etc. If any Utility facility does qualify for an adjustment due to accrued depreciation as defined in Program Guide: *Utility Relocation and Accommodation on Federal Aid Highway Projects*, the costs are calculated according to the formula in the Program Guide and the result is shown as a Utility cost in Exhibit B Cost Estimate.
- 1.4 WSDOT, acting on behalf of the Utility, agrees to perform the Utility facilities Work in accordance with Exhibit A, Special Provisions, and Exhibit C, Plans, where either: (1) Utility supplied the Work plans and special provisions to WSDOT, or (2) WSDOT developed the Work plans and special provisions from Utility-provided information. WSDOT has incorporated the Plans and Special Provisions into WSDOT Project in accordance with Utility requirements. The Utility agrees that it is solely responsible for ensuring that all Special Provisions, Plans and Utility standards are met and that it has supplied WSDOT the with all applicable standards, codes, regulations, or any other requirements the Utility is obligated to meet, unless otherwise noted.
- 1.5 The Utility has reviewed and approved the Work Special Provisions and Plans that have been incorporated into WSDOT Project. WSDOT will advertise the Work and Project for bids. WSDOT will be the Utility's representative during the Ad and award period. When requested by WSDOT, the Utility shall timely assist WSDOT in answering bid questions and resolving any design issues that may arise that are associated with the Work. All comments and clarifications must go through WSDOT. If the Utility supplied the Work plans and special provisions, the Utility agrees to provide WSDOT with any addenda required for the Work during the Ad period, to the Parties' mutual satisfaction.
- 1.6 WSDOT will provide the Utility with written notification of the bid price on the day of bid opening for all Work items for which the Utility is responsible for the cost. The Utility shall respond in writing to WSDOT, stating its acceptance or rejection of the Work items, within two (2) working days.
- 1.7 Should the Utility reject the bid Work items for which it has cost responsibility:
  - 1.7.1 WSDOT shall delete said items from the Project. The Utility agrees to reimburse WSDOT for engineering costs and direct and related indirect costs incurred by WSDOT associated with deleting the bid Work items from the Project, including any redesign, reengineering or re-estimating, if necessary, to delete the Work items, and the Utility agrees to pay such costs upon receipt of a WSDOT invoice.
  - 1.7.2 The Utility agrees that should it reject the bid Work items for which it has cost responsibility, it shall continue to be obligated to timely relocate its facilities as required by WSDOT Project. The Utility further agrees that should its actions delay or otherwise damage WSDOT Project, it shall be liable for such costs.

## **2. Construction, Inspection, and Acceptance**

- 2.1 WSDOT agrees to administer the Work on behalf of the Utility.
- 2.2 The Utility agrees to disconnect and/or reconnect its facilities as required by WSDOT when such disconnection or reconnection is required to be performed by the Utility. The Parties agree to define disconnect and/or reconnection requirements, including notification and response in Exhibit A. WSDOT agrees, as part of the Work, to remove disconnected and/or abandoned facilities at the cost of either WSDOT or Utility, whichever is responsible for such costs. Utilities abandoned, deactivated, or disconnected must be done in a manner in accordance with WSDOT's Utilities Manual

- 2.3 Salvage: All materials removed by WSDOT shall be reclaimed or disposed of by WSDOT and shall become the property of WSDOT. If the Utility desires to retain such materials and WSDOT agrees, the value of salvaged materials will be paid to WSDOT in an amount not less than that required by the *Program Guide: Utility Relocation and Accommodation on Federal Aid Highway Projects*.
- 2.4 The Utility may furnish an inspector for the Work. The Utility agrees that it is solely responsible for all such inspection costs. The Utility's inspector shall not directly contact WSDOT's contractor. All contact between the Utility's inspector and WSDOT's contractor shall be through WSDOT's representatives. WSDOT's Project Construction Engineer may require the removal and/or replacement of the Utility's inspector if the inspector interferes with WSDOT's Project, WSDOT's contractor and/or the Work.
- 2.5 WSDOT shall promptly notify the Utility in writing when the Work is completed.
- 2.6 The Utility shall, within \_\_\_\_\_ ( ) working days of being notified that the Work is completed: (a) deliver a letter of acceptance to WSDOT which shall include a release and waiver of all future claims or demands of any nature resulting from the performance of the Work and WSDOT's administration thereof, or (b) deliver to WSDOT written reasons why the Work does not comply with the previously approved Plans and Special Provisions.
- 2.7 If the Utility does not respond within \_\_\_\_\_ ( ) working days as provided in section 2.6, the Work and WSDOT's administration thereof will be deemed accepted by the Utility, and WSDOT shall be released from all future claims and demands.
- 2.8 Upon completion and acceptance of the Work pursuant to Sections 2.6 or 2.7, the Utility agrees that it shall be solely responsible for all future ownership, operation and maintenance costs of its facilities, without WSDOT liability or expense.
- 2.9 WSDOT will prepare the final construction documentation in general conformance with WSDOT's Construction Manual. WSDOT will maintain one set of plans as the official "as-built" set, then make notations in red of all plan revisions typically recorded per standard WSDOT practice, as directed by WSDOT's Construction Manual. Once the Utility has accepted the Work per Section 2.6 or 2.7, WSDOT upon request by the Utility will provide one reproducible set of contract as-builts to the Utility, and the Utility agrees to pay the cost of reproduction upon receipt of a WSDOT invoice.

### 3. Payment

- 3.1 The Utility agrees that it shall be responsible for the actual direct and related indirect costs, including mobilization, construction engineering, contract administration and overhead costs, associated with the Work for (1) new Utility facilities, (2) betterments, and/or (3) Work where the Utility does not have a documented ownership of and/or interest in real property, such as an easement, fee title, or a court finding of prescriptive right for its facilities. The cost of this Work is estimated to be \_\_\_\_\_ Dollars (\$ \_\_\_\_\_ ). An itemized estimate of Utility-responsible costs for Work to be performed by WSDOT on behalf of the Utility is included in Exhibit B, Cost Estimate.
- 3.2 WSDOT agrees that it shall be responsible for all Work costs where the Utility does have a documented ownership of and/or interest in real property, such as an easement, fee title, or a court finding of prescriptive right for its facilities. Exhibit B contains an itemized estimate of WSDOT-responsible costs for Work to be performed by WSDOT on behalf of the Utility.
- 3.3 The Utility agrees to pay WSDOT the "Advance Payment Amount" Stated above within twenty (20) days after WSDOT submits its first partial payment request to the Utility. The advance payment represents fifteen (15) percent of the estimate of cost for which the Utility is responsible. The advance payment will be carried throughout the life of the Work with final adjustment made in the final invoice.

- 3.4 The Parties acknowledge and agree that WSDOT does not have the legal authority to advance WSDOT funds for the Utility's cost portion of the Work under this Agreement. Should the Utility fail to make payment according to the terms of this Agreement, WSDOT shall have the right to terminate this Agreement, charging the Utility for all associated costs of termination, including non-cancellable items, as well as associated Project delay and contractor claims. Such termination shall not relieve the Utility's obligation to timely relocate its facilities as provided under section 1.7.2.
- 3.5 The Utility, in consideration of the faithful performance of the Work to be done by WSDOT, agrees to pay WSDOT for the actual direct and related indirect cost of all Work for which the Utility is responsible, including mobilization, construction engineering, contract administration and overhead costs. WSDOT shall invoice the Utility and provide supporting documentation therefore, and the Utility agrees to pay WSDOT within thirty (30) days of receipt of an invoice. A partial payment will not constitute agreement as to the appropriateness of any item and that, at the time of final payment, the Parties will resolve any discrepancies.

#### **4. Change in Work or Cost Increase**

- 4.1 Increase in Cost: In the event unforeseen conditions require an increase in the cost of the Work for which the Utility is responsible, above the Exhibit B, Cost Estimate (including sales tax, engineering, and contingencies) by more than \_\_\_\_\_ ( ) percent, the Parties agree to modify Exhibit B to include such cost increase.
- 4.2 If WSDOT determines that additional Work or a change in the Work is required, prior written approval must be secured from the Utility; however, where the change is required to mitigate a Project emergency or safety threat to the traveling public, WSDOT will direct the change without the Utility's prior approval. WSDOT will notify the Utility of such change as soon as possible thereafter. The Utility agrees to respond to all WSDOT change order requests in writing and within the time limits identified in Exhibit A. The UTILITY agrees to pay all change order Work costs for which it is responsible, as well as the costs of Project or Work delays and/or subsequent contractor claims associated with the Utility's failure to timely respond as required.
- 4.3 The Utility may request additions to the Work through WSDOT in writing. WSDOT will implement the requested changes as elective changes, provided that a change does not negatively impact WSDOT's transportation system and complies with the Standard Specifications, Project permits, State and/or federal law, applicable rules and/or regulations, and/or State design policies, and does not unreasonably delay critically scheduled Project contract activities.
- 4.4 All elective changes to the Work shall be approved in writing by the Utility before WSDOT directs the contractor to implement the changes, even if an executed change order is not required by the Project contract. The Utility agrees to pay for the increases in cost, if any, for such elective changes in accordance with Section 3.
- 4.5 WSDOT will make available to the Utility all change order documentation related to the Work.

#### **5. Franchise, Permit or Easement**

- 5.1 Upon completion of the Work covered under this Agreement, the Utility agrees to prepare, execute and deliver to WSDOT a quitclaim deed for all existing easements, fee title, or court finding of prescriptive right, which will be vacated as a result of the relocation of Utility facilities.
- 5.2 In exchange for the quit claim deed, WSDOT agrees to grant or issue the Utility an easement, permit, or franchise, as defined in Exhibit A, for those Utility facilities which will remain on or which cross WSDOT's right-of-way and for which the Utility had an easement, fee title or court finding of prescriptive right. A legal description of and use conditions for an easement to be granted encumbering State right of way shall be included in Exhibit A.

- 5.3 After execution of this agreement, WSDOT will notify the Utility to apply for a permit, franchise or an amendment to its current franchise, upon which the Utility shall apply for a permit, franchise or an amendment to its current franchise or permit for those new or modified Utility facilities that will be located within the State's right of way. After receiving the application, WSDOT will issue the Utility a permit or a new or amended franchise.

## 6. Right of Entry

- 6.1 The Utility hereby grants to WSDOT a right of entry onto all lands in which it has an interest for construction of the Work as defined in Exhibits A and C. Upon completion and acceptance of the Work, this right of entry shall terminate, except as otherwise provided in Section 5.
- 6.2 The Utility agrees to arrange for rights of entry upon all privately owned lands upon which the Utility has an easement, documented property interest, or permit that are necessary to perform the Work. The Utility also agrees to obtain all necessary permissions for WSDOT to perform the Work on such lands, which may include reasonable use restrictions on those lands. The Utility agrees to provide the rights of entry and applicable permissions to WSDOT within \_\_\_\_\_ ( ) days of entering into this Agreement. Upon completion of the Work on such lands, the rights of entry and permissions shall terminate, except as otherwise provided in Section 5.

## 7. General Provisions

- 7.1 Indemnification: To the extent permissible under law, the Utility, its successors and assigns, agree to indemnify, defend, and hold harmless WSDOT and the State of Washington and its officers and employees, from all claims, demands, damages (both to persons and/or property), expenses, regulatory fines, and/or suits that: (1) arise out of or are incident to any acts or omissions by the Utility, its agents, contractors, and/or employees, in the use of the state highway right of way as authorized by the terms of this Agreement, or (2) are caused by the breach of any of the conditions of this Agreement by the Utility, its contractors, agents, and/or employees. The Utility, its successors and assigns, shall not be required to indemnify, defend, or hold harmless WSDOT or the State of Washington and its officers and employees, if the claim, suit, or action for damages (both to persons and/or property) is caused by the sole acts or omissions of WSDOT, its officers and employees; provided that, if such claims, suits, or actions result from the concurrent negligence of (a) WSDOT, its officers and employees and (b) the Utility, its agents, contractors, and/or employees, or involves those actions covered by RCW 4.24.115, the indemnity provisions provided herein shall be valid and enforceable only to the extent of the concurrent acts or omissions of WSDOT, its officers and employees and the Agency, its agents, contractors, and/or employees.

The Utility agrees that its obligations under this section extend to any claim, demand and/or cause of action brought by, or on behalf of, any of its employees or agents while performing construction, operation and/or maintenance of the Improvements under this Agreement. For this purpose, the Utility, by mutual negotiation, hereby waives with respect to WSDOT only, any immunity that would otherwise be available to it against such claims under the Industrial Insurance provisions chapter 51.12 RCW.

This indemnification and waiver shall survive the termination of this Agreement.

- 7.2 Disputes: If a dispute occurs between the Utility and WSDOT at any time during the performance of the Work, the Parties agree to negotiate at the management level to resolve any issues. Should such negotiations fail to produce a satisfactory resolution, the Parties agree to enter into arbitration and/or mediation before proceeding to any other legal remedy. Each Party shall be responsible for its own fees and costs. The Parties agree to equally share in the cost of a mediator or arbiter.

- 7.3 Venue: In the event that either Party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, the Parties hereto agree that any such action or proceedings shall be brought in the superior court situated in \_\_\_\_\_ County, Washington. Further, the Parties agree that each shall be responsible for its own attorney's fees and costs.
- 7.4 Termination:
- 7.4.1 Unless otherwise provided herein, the Utility may terminate this Agreement upon thirty (30) calendar days' written notice to WSDOT. If this Agreement is terminated by the Utility prior to the fulfillment of the terms Stated herein, the Utility shall reimburse WSDOT for all actual direct and related indirect expenses and costs, including mobilization, construction engineering, contract administration and overhead costs, incurred up to the date of termination associated with the Utility Work, as well as the cost of non-cancelable obligations, including any redesign, reengineering or re-estimating, if necessary, to delete the Work, and contractor claims, if any, payment in accordance with Section 3. Further, the Utility acknowledges and agrees that should it terminate this Agreement, such termination shall not relieve the Utility from its responsibility to design, remove, relocate and/or construct its facilities so as not to delay or conflict with WSDOT's Project. WSDOT agrees to provide to the Utility all Work-related documents upon final payment by the Utility.
- 7.4.2 Unless otherwise provided herein, WSDOT may terminate this Agreement upon thirty (30) calendar days' written notice to the Utility. Should WSDOT terminate this Agreement, the Utility shall reimburse WSDOT for all actual direct and related indirect expenses and costs, including mobilization, construction engineering, contract administration and overhead costs, incurred by WSDOT up to the date of termination associated with the Utility Work. The Utility acknowledges and agrees that should WSDOT terminate this Agreement, such termination shall not relieve the Utility from its responsibility to design, remove, relocate and/or construct its facilities so as not to delay or conflict with WSDOT's Project. WSDOT agrees to provide to the Utility all Work-related documents upon final payment by the Utility.
- 7.5 Amendments: This Agreement may be amended by the mutual agreement of the Parties. Such amendments or modifications shall not be binding unless put in writing and signed by persons authorized to bind each of the Parties.
- 7.6 Independent Contractor: Both Parties shall be deemed independent contractors for all purposes, and the employees of each Party and any of its contractors, subcontractors, consultants, and the employees thereof, shall not in any manner be deemed to be the employees of the other Party.
- 7.7 Audit and Records: During the progress of the Work and for a period of not less than six (6) years from the date of final payment, both Parties shall maintain the records and accounts pertaining to the Work and shall make them available during normal business hours and as often as necessary, for inspection and audit by the other Party, State of Washington, and/or Federal Government and copies of all records, accounts, documents or other data pertaining to the Work will be furnished upon request. The requesting Party shall pay the cost of copies produced. If any litigation, claim or audit is commenced, the records and accounts along with supporting documentation shall be retained until any litigation, claim or audit finding has been resolved even though such litigation, claim or audit continues past the six-year retention period.
- 7.8 Working Days: Working days for this Agreement are defined as Monday through Friday, excluding Washington State holidays per RCW 1.16.050.

7.9 Counterparts: This Agreement may be executed in multiple counterparts or in duplicate originals. Each counterpart or each duplicate original shall be deemed an original copy of this Agreement signed by each Party, for all purposes. Electronic signatures or signatures transmitted by email in a “pdf” may be used in place of original signatures on this Agreement. Each Party intends to be bound by its electronic or “pdf” signature on this Agreement and is aware that the other Party is relying on its electronic or “pdf” signature.

**In Witness Whereof**, the Parties hereto have executed this Agreement as of the day and year last written below.

Utility	Washington State Department of Transportation
Signature: _____	Signature: _____
By: _____ Print Name	By: _____ Print Name
Title: _____	Title: _____
Date: _____	Date: _____