

11/17/98

72-R-98

A Resolution

**Authorizing the City Manager to
Sign An Agreement with Metricom, Inc.
For the Use of Municipal Facilities to
Provide Telecommunication Service
through a Wireless Network**

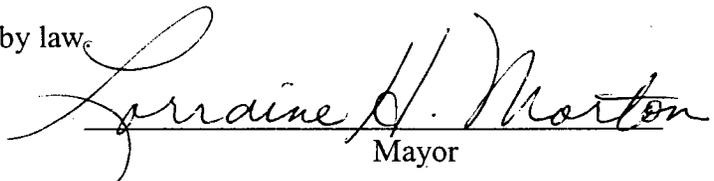
NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY
OF EVANSTON, COOK COUNTY, ILLINOIS:

SECTION 1: That the City Manager is hereby authorized and directed to sign and the
City Clerk hereby authorized to attest on behalf of the City of Evanston an Agreement by and
between the City of Evanston and Metricom, Inc., for the use of municipal facilities to provide
telecommunication service through a wireless network.

Said Agreement is marked as Exhibit A attached hereto and incorporated herein by reference.

SECTION 2: That the City Manager is hereby authorized and directed to negotiate any
additional terms and conditions of the Agreement as may be determined to be in the best interests
of the City.

SECTION 3 That this Resolution shall be in full force and effect from and after its
passage and approval in the manner provided by law.



Mayor

ATTEST:



City Clerk

Adopted: December 14, 1998



CITY OF EVANSTON

Municipal Facilities Use Agreement

THIS MUNICIPAL FACILITIES USE AGREEMENT (this "Use Agreement") is dated as of December 15, 1998, (the "Effective Date"), and entered into by and between the CITY OF EVANSTON, an Illinois home rule municipal corporation (the "City"), and METRICOM, INC., a Delaware corporation ("Metricom").

Recitals

A. Metricom is in the business of constructing, maintaining, and operating a wireless digital data communications radio network known as Ricochet[®], a network operated in accordance with regulations promulgated by the Federal Communications Commission, utilizing Radios (as defined in §1.15 below) and related equipment certified by the Federal Communications Commission.

B. Metricom is and will throughout the term of this Use Agreement be both "a retailer maintaining a place of business in this State" and be engaged in the "sale of telecommunications at retail," as each of those terms are defined in the Illinois Telecommunications Municipal Infrastructure Maintenance Fee Act, P.A. 90-154 (the "TMIMF Act"), and in Section 3-30-1 of the Municipal Code of the City.

C. Subject to reasonable municipal regulations concerning the time, location, manner of attachment, installation, maintenance of its facilities, and payment of such telecommunications infrastructure maintenance fees as may be required under the TMIMF Act and local ordinances enacted pursuant thereto, Metricom has the right under federal and Illinois law to install telecommunications facilities in the public right-of-way, as defined herein.

D. Metricom understands that the City's municipal facilities generate no power during the day and therefore wishes to locate, place, attach, install, operate, and maintain Radios on facilities owned by third parties, located in the public right-of-way for purposes of operating Ricochet[®]. This does not preclude Metricom from using Municipal Facilities for its Radios in the future subject to all of the provisions herein.

E. Metricom's right to install telecommunications facilities in the public right-of-way under the conditions aforesaid does not extend to the installation by Metricom of telecommunications facilities on "municipal facilities," as defined herein, and access to said municipal facilities requires separate agreement with the City.

F. Metricom and the City, having reached agreement on the terms and conditions of Metricom's access to the public right of way for the purpose of attaching,

installing, operating and maintaining Radios on facilities owned by a third party, now desire to reduce this agreement to writing in the form of this Use Agreement, so as to more particularly set forth the terms and conditions of said access and such other mutual agreements, representation and covenants which have been agreed between the parties as consideration for entering into this Use Agreement.

Agreement

Now, therefore, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree to the following covenants, terms, and conditions:

1 DEFINITIONS. The following definitions shall apply generally to the provisions of this Use Agreement:

1.1 Abandoned. "Abandoned" shall refer to any Radio installed on a municipal facility that has been left by Metricom in an unused or non-functioning condition for more than one hundred and twenty (120) consecutive days, unless Metricom shall establish to the reasonable satisfaction of the City that the Radio(s) in question has(have) continued viability at its(their) location(s).

1.2 Agency. "Agency" means any governmental or quasi-governmental agency other than the City, including the Federal Communications Commission and the ICC (as such term is defined in § 1.3 below).

1.3 ICC. "ICC" means the Illinois Commerce Commission.

1.4 Fee. "Fee" means any assessment, license, charge, fee, imposition, tax, or levy of general application to Persons doing business in the City lawfully imposed by any governmental body (but excluding any utility users' tax, franchise fees, telecommunications tax, telecommunications infrastructure maintenance fee or similar tax or fee).

1.5 Illinois Local Government and Governmental Employees Tort Immunity Act. "Illinois Local Government and Governmental Employees Tort Immunity Act" shall refer to and incorporate by reference the Public Act of the State of Illinois of the same name and set forth in 745 ILCS 10/1-101, *et seq.*, now or hereafter amended.

1.6 Installation Date. "Installation Date" shall mean the date that the first Radio is installed by Metricom in the public right-of-way pursuant to this Use Agreement.

1.7 Laws. "Laws" means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders,

certificates, orders, or other requirements of the City or other governmental agency having joint or several jurisdiction over the parties to this Use Agreement, and all subsequent amendments thereto, as may be in effect either as of the Effective Date or at any time during the presence of Radios in the public right-of-way.

1.8 Local Public Entity. "Local public entity" shall have the same meaning as that set forth in Section 1-206 of the Illinois Local Government and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101, *et seq.*, 10/1-206), now or hereafter amended.

1.9 Metricom. "Metricom" means Metricom, Inc., a corporation duly organized and existing under the laws of the State of Delaware, and its lawful successors, assigns, and transferees.

1.10 Municipal Access Program. "Municipal Access Program" means the discount program described in § 4.5 below.

1.11 Municipal Facilities. "Municipal Facilities" means City-owned street light poles, lighting fixtures, or electroliers located within the public right-of-way, and may refer to such facilities in the singular or plural, as appropriate to the context in which used.

1.12 Public Right of Way. "Public right of way" means any municipal street, alley, water or public right-of-way dedicated or commonly used now or hereafter for utility purposes, including but not limited to overhead lighting facilities, and including utility easements wherein the City now or hereafter acquires the right and authority to locate or permit the location of utilities consistent with telecommunications facilities. This term shall not include any municipal facilities, nor shall it include county, state, or federal rights of way or any property owned by any Person or Agency other than the City, except as provided by applicable Laws or pursuant to a maintenance, jurisdictional or other agreement between the City and any such Person or Agency.

1.13 Person. "Person" means an individual, a corporation, a limited liability company, a general or limited partnership, a sole proprietorship, a joint venture, a business trust, or any other form of business entity or association.

1.14 Provision. "Provision" means any agreement, clause, condition, covenant, qualification, restriction, reservation, term, or other stipulation in this Use Agreement that defines or otherwise controls, establishes, or limits the performance required or permitted by any party to this Use Agreement. All Provisions, whether covenants or conditions, shall be deemed to be both covenants and conditions.

1.15 **Radio.** "Radio" means the radio equipment, whether referred to singly or collectively, to be installed and operated by Metricom hereunder, and described in the attached appendix to this Use Agreement. No other sort of telecommunications equipment or facilities shall be deemed included in the term "Radio."

1.16 **Ricochet®.** "Ricochet®" or "Ricochet® MCDN" means Ricochet® MicroCellular Digital Network, a wireless, microcellular digital radio communications network owned and operated by Metricom.

1.17 **Services.** "Services" means the wireless digital communications services provided through Ricochet® by Metricom.

1.18 **TMIMF Act.** "TMIMF Act" shall mean the Telecommunications Municipal Infrastructure Maintenance Fee Act of the State of Illinois, Public Act No. 90-154, now or hereafter amended.

1.19 **City.** "City" means the City of Evanston.

1.20 **City IMF Ordinance.** "City IMF Ordinance" shall refer to Ordinance No. 96-O-97, adopted by the corporate authorities of the City on or about September 22, 1997 and imposing a municipal telecommunications infrastructure maintenance fee as authorized and provided for in the TMIMF Act, now or hereafter amended.

1.21 **City Telecommunications Tax Ordinance.** "City Telecommunications Tax Ordinance" shall refer to Ordinance No. 4-O-66, adopted by the corporate authorities of the City on or about January 24, 1966 and imposing a municipal utility tax as authorized and provided for pursuant to the Illinois Municipal Code, now or hereafter amended.

1.22 **Use Agreement.** "Use Agreement" means this nonexclusive Use Agreement and may also refer to the associated right to encroach upon the public right-of-way conferred hereunder.

2 **TERM.** This Use Agreement shall be effective as of the Effective Date and shall extend for a term of nine (9) years commencing on the Installation Date, unless it is earlier terminated by either party in accordance with the provisions herein. The term of this Use Agreement shall be renewed automatically for three (3) successive terms of five (5) years each on the same terms and conditions as set forth herein, unless either party notifies the other of its intention not to renew not less than thirty (30) calendar days prior to commencement of the relevant renewal term.

3 **SCOPE OF USE AGREEMENT.** Any and all rights expressly granted to Metricom under this Use Agreement, which shall be exercised at Metricom's sole cost and expense, shall be subject to the prior and continuing right of the City under applicable Laws to use

any and all parts of the public right-of-way exclusively or concurrently with any other Person or Persons and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the public right-of-way. Nothing in this Use Agreement shall be deemed to grant, convey, create, or vest in Metricom a real property interest in land, including any fee, leasehold interest, or easement. Any work performed pursuant to the rights granted under this Use Agreement may, at the City's option, be subject to the reasonable prior review and approval of the City.

3.1 Attachment to Municipal Facilities. If Municipal Facilities are ever used by Metricom for their Radios, subject to the provisions of Section 3.5, requiring Metricom to obtain permits approving the method and location of its installation of Radios, the City hereby authorizes and permits Metricom to enter upon the public right-of-way and to locate, place, attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace Radios in or on Municipal Facilities for the purposes of operating Ricochet and providing Services to Persons located within or without the limits of the City. In addition, subject to the provisions of Section 4 below, Metricom shall have the right to draw electricity for the operation of the Radios from the power source associated with each such attachment to Municipal Facilities.

3.2 Attachment to Third-Party Property. Subject to obtaining the permission of the owner(s) of the affected property, the City hereby authorizes and permits Metricom to enter upon the public right-of-way and to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace such number of Radios in or on poles or other structures owned by public utility companies or other property owners located within the public right-of-way as may be permitted by the public utility company or property owner, as the case may be. Upon request, Metricom shall furnish to the city documentation of such permission from the individual utility or property owner responsible. The City agrees to provide to Metricom, at no cost or expense to the City, such information as Metricom may reasonably require in the course of obtaining where necessary the consents of third-party owners of property located in the Municipal Right of Way, provided such information is not privileged, proprietary, exempt from disclosure under the Illinois Freedom of Information Act, or otherwise protected by law from disclosure.

3.3 No Interference. Metricom in the performance and exercise of its rights and obligations under this Use Agreement shall not interfere in any manner with the existence, maintenance, repair, replacement, enlargement or operation of any and all public and private rights of way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliers, cable television, and other telecommunications, utility, or municipal property, without the express written approval of the owner or owners of the

affected property or properties or the City, as the case may be, except as permitted by applicable Laws or this Use Agreement. The City agrees to require the inclusion of substantially the same prohibition on interference as that stated above in all agreements and franchises the City may enter into after the Effective Date with other telecommunications providers and carriers of functionally equivalent services.

3.4 Compliance with Laws. Metricom shall comply with all applicable Laws in the exercise and performance of its rights and obligations under this Use Agreement.

3.5 Obtaining Required Permits. If the attachment, installation, operation, maintenance, or location of the Radios in the public right-of-way shall require any permits, Metricom shall, if required under applicable City ordinances, apply for the appropriate permits and pay any standard and customary permit fees. The City shall promptly respond to Metricom's requests for permits and shall otherwise cooperate with Metricom in facilitating the deployment of Ricochet® in the Municipal Right of Way in a reasonable and timely manner. The proposed locations of Metricom's planned initial installation of Radios shall be provided to the City promptly after Metricom's review of available street light maps and prior to deployment of the Radios.

3.6 Notice of Location of Radios. Upon the completion of installation, Metricom promptly shall furnish to the City documentation in MapInfo® or in such other format as may be reasonably required by the City Engineer showing the exact location of the Radios in the Municipal Right of Way. Metricom shall provide to the City supplemental documentation showing the relocation, removal and/or abandonment of existing Radios or the installation of new Radios within thirty (30) days of their relocation or installation, as the case may be.

3.7 Use Agreement Extends Only to Installation of Radios. The rights granted Metricom under this Use Agreement extend only to the installation of the Radios described herein on Municipal Facilities in the manner described herein or on Third-Party Property in the manner provided in Section 3.2, and does not create any right to install different or additional telecommunications facilities in the public right-of-way or on Municipal Facilities or on Third-Party Property. Under no circumstances is the closing, excavation or opening of any public right-of-way authorized or permitted under this Use Agreement.

3.8 Exclusion of Certain Municipal Facilities. If Municipal Facilities are ever to be used for Metricom's Radios, prior to the installation of radios on Municipal Facilities and after Metricom provides the City with its proposed locations for installation of the radios on Municipal Facilities, the City may in its discretion

designate certain Municipal Facilities to be excluded from those on which Radios may be installed by Metricom, including but not limited to ornamental or similar specially-designed street lights, or other Municipal Facilities which, in the reasonable judgment of the City's Engineer do not have electrical service adequate or appropriate for Metricom's Radios or cannot safely bear the weight or wind loading caused by the presence of Metricom's radios, or any other Municipal Facility that in the reasonable judgment of the City's Engineer is incompatible with the Radio or would be rendered unsafe or unstable by the installation of a Radio.

3.9 Engineer's Certification. At the time of execution of this Use Agreement, Metricom shall provide the City and attach to this Use Agreement as Exhibits hereto a certified Standard Wind Loading Study and a certified Attachment Detail showing typical installation for the Radios, each of which shall be certified by a registered Professional Engineer.

3.10 No Introduction of Hazardous Materials. Metricom represents and warrants that its use of the public right-of-way and Municipal Facilities, and its installation of Radios as provided herein, will not introduce or generate any hazardous substance, and it will not store or dispose on the the public right-of-way or Municipal Facilities nor transport to or over the the public right-of-way or Municipal Facilities any hazardous substance.

4 COMPENSATION; DISCOUNTS; UTILITY CHARGES. Metricom shall be solely responsible for the payment of all lawful Fees in connection with Metricom's performance under this Use Agreement, including those set forth below.

4.1 Municipal Telecommunications Infrastructure Maintenance Fee. Metricom acknowledges that it is a telecommunications "retailer maintaining a place of business in this State" and is engaged in the "sale of telecommunications at retail," as those terms are defined in both the TMIMF Act and the City IMF Ordinance. Metricom acknowledges that it is subject to payment to the City IMF Ordinance and shall comply at all times with the current provisions of said Ordinance. Payment of any infrastructure maintenance fee to the City pursuant to the City IMF Ordinance is an obligation under law that exists independently of this Use Agreement, and payment thereof shall not constitute a franchise fee or any other form of compensation solely for the use or occupancy of the public right-of-way pursuant to this Use Agreement. In consideration of the covenants and agreements made herein by the City, Metricom releases and waives any objection or challenge it might have against the validity, enactment or imposition of the City IMF Ordinance by the City, and further agrees that its violation of that Ordinance shall constitute a breach of its obligations under Section 3.4 (Compliance with Laws) of this Use Agreement and a default of a material term hereof pursuant to Section 9 of this Use Agreement. Metricom further agrees

that if a court or administrative agency of competent jurisdiction should declare either the City IMF Ordinance or the TMIMF Act unconstitutional or invalid, then Metricom and the City shall each be obligated to negotiate in good faith to amend Section 4 of this Use Agreement and if, after one hundred and eighty (180) days from the commencement of negotiations or such extension thereof that may be agreed by the parties, the City and Metricom are unable to reach agreement on amendments hereto, then this Use Agreement shall be deemed terminated and Metricom shall promptly remove its Radios from the Municipal Facilities.

4.2 Municipal Telecommunications Tax. Metricom acknowledges that it is a telecommunications "retailer maintaining a place of business in this State" and is engaged in the "sale at retail" of telecommunications as those terms are defined in the City Telecommunications Tax Ordinance. Metricom acknowledges that it is subject to payment to the City Telecommunications Tax Ordinance and shall comply at all times with the current provisions of said Ordinance. Payment of any municipal telecommunications tax to the City pursuant to the City Telecommunications Tax Ordinance is an obligation under law that exists independently of this Use Agreement, and payment thereof shall not constitute a franchise fee or any other form of compensation solely for the use or occupancy of the public right-of-way pursuant to this Use Agreement. In consideration of the covenants and agreements made by the City, Metricom releases and waives any objection or challenge it might have against the validity, enactment or imposition of the City Telecommunications Tax Ordinance by the City, and further agrees that its violation of that Ordinance shall constitute a breach of its obligations under Section 3.4 (Compliance with Laws) of this Use Agreement and a default of a material term hereof pursuant to Section 9 of this Use Agreement.

4.3 Annual Fee. If Municipal Facilities are used, Metricom shall pay to the City an annual fee (the "Annual Fee") in the amount of Sixty Dollars (\$60.00) for the use of each Municipal Facility upon which a Radio has been installed, located or maintained pursuant to this Use Agreement. The aggregate annual Fee for the first year of the term shall be equal to the number of Radios proposed to be installed by Metricom in the Facilities Map submitted to the City multiplied by the Annual Fee, and shall be paid no later than thirty (30) days after the Installation Date. On each succeeding anniversary of the Installation Date, Metricom shall pay an aggregate Annual Fee in an amount equal to the number of Radios installed on Municipal Facilities on the anniversary of the Installation date multiplied by the Annual Fee, prorated as appropriate.

4.3.1 CPI Adjustment. Effective commencing on the second (2nd) anniversary of the Installation Date and continuing on every second (2nd) anniversary thereafter during the term, the Annual Fee with respect to the ensuing five-year period shall be increased by a percentage amount equal

to the percentage increase in the U.S. Department of Labor, Bureau of Labor Statistics Consumer Price Index (CPI-U, All Items, Urban Consumers, Chicago Area, 1982-1984=100) which occurred during the previous two-year period.

4.4 Electricity Charges. Metricom shall be solely responsible for the payment of all electrical utility charges to the applicable utility company based upon the Radios' usage of electricity and applicable tariffs. Metricom shall provide the City with documentation sufficient to demonstrate that it has established an unmetered rate for the consumption of electricity by the Radio(s) with the appropriate electricity distributor and/or supplier, as the case may be, to provide for its payment for the use of unmetered electricity to operate the Radio(s).

4.5 Municipal Access Program. In consideration of the City's execution and delivery of this Use Agreement, the City shall have the right throughout the term of this Use Agreement to purchase, when such service is commercially available in the City, up to the maximum number set forth below (based upon the City's population) of Ricochet® basic service subscriptions at the rate of fifty percent (50%) of the regular rate as current from time to time. The number of subscriptions which the City may purchase at the Municipal Access Program rate shall be determined in accordance with the City's official population, as shown on the latest available census data, as follows: (a) for municipalities with a population of less than 100,000, up to a maximum of twenty (20) discount subscriptions; (b) for municipalities with a population of 100,000 to 249,000, up to a maximum of thirty (30) discount subscriptions; (c) for municipalities with a population of 250,000 to 500,000, up to a maximum of forty (40) discount subscriptions; and (d) for municipalities with a population of over 500,000, up to a maximum of fifty (50) discount subscriptions. The City understands and agrees that Metricom's modems and equipment required to utilize the discounted subscriptions and any additional service subscriptions or service options the City may desire are expressly excluded from this special Municipal Access Program rate and may be obtained from either Metricom or an authorized retailer at market rates current from time to time or under other promotional programs which may be available from time to time in addition to the Municipal Access Program rate. The City shall use all subscriptions provided pursuant to this § 4.5 solely for its own use and shall not be entitled to resell, distribute, or otherwise permit the use of the same by any other Person, excepting a local public entity that provides public services within the corporate boundaries of the City. The level of benefits and services provided to the City by Metricom as "basic service" shall not be diminished or reduced during the term of this Use Agreement or renewal thereof, or prior to its cancellation or termination, as the case may be. Metricom and the City agree that all benefits and services offered under this Section, whether for the use of the City or another unit of local

government, shall be acquired under and pursuant to the City's lawful purchasing and procurement process and procedures.

5 REMOVAL OR RELOCATION OF RADIOS. Metricom understands and acknowledges that the City may require Metricom to remove from a specific Municipal Facility and relocate one or more of its Radios, and Metricom shall at the City's direction relocate such Radios at Metricom's sole cost and expense, whenever the City reasonably determines that the relocation is needed for any of the following purposes: (a) if required for the construction, completion, repair, relocation, or maintenance of a project; (b) because particular Municipal Facility is being eliminated, whether due to undergrounding of utilities, relocation, or other cause; (c) because the Radio has been abandoned; (d) because the Radio is interfering with or adversely affecting proper operation of City-owned light poles, traffic signals, or other Municipal Facilities; or (f) to protect or preserve the public health or safety. In any such case, the City shall use its best efforts to afford Metricom a reasonably equivalent alternate location. If Metricom shall fail to relocate any Radios as requested by the City within a reasonable time under the circumstances in accordance with the foregoing provision, but in any event, not to exceed thirty (30) days without the agreement of the City, the City shall be entitled to remove or relocate the Radios at Metricom's sole cost and expense, without further notice to Metricom, and Metricom shall, within thirty (30) days of invoice to same, reimburse the City for its expenses incurred in the removal, relocation and disposal of the Radios. The provisions of this Section 5 and its further subsections shall survive the expiration or earlier termination of this Use Agreement or renewal thereof.

5.1 Relocations at Metricom's Request. In the event Metricom desires to relocate any Radios from one Municipal Facility to another, Metricom shall so advise the City. The City will use reasonable efforts to accommodate Metricom by making another reasonably equivalent Municipal Facility available for use in accordance with and subject to the terms and conditions of this Use Agreement.

5.2 Alteration or Damage to Municipal Facilities or Public Right of Way. Whenever the removal or relocation of Radios is required or permitted under this Use Agreement, and such removal or relocation shall cause the public right-of-way or Municipal Facilities to be damaged or to have been altered in such a manner as to make them unusable, unsafe, or in violation of electrical codes or other applicable law, Metricom, at its sole cost and expense, shall promptly repair and return the public right-of-way or Municipal Facilities in or on which the Radios are located to its original condition and in accordance with currently applicable Laws, normal wear and tear excepted. If Metricom does not repair and restore the public right-of-way or Municipal Facilities as just described, then the City shall have the option, upon fifteen (15) days' prior written notice to Metricom, to perform or cause to be performed such reasonable and necessary work on behalf of Metricom and to charge Metricom for the proposed costs to be incurred or the actual costs incurred by the City at the City's standard rates.

Upon the receipt of a demand for payment by the City, Metricom shall within thirty (30) days reimburse the City for such costs.

6 **INDEMNIFICATION AND WAIVER.** Metricom agrees to indemnify, defend, protect, and hold harmless the City, its corporate authorities, officers, and employees from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, all costs and cleanup actions of any kind, and all costs and expenses incurred in connection therewith, including but not limited to reasonable attorney's fees, expert witness fees and costs of defense (collectively, the "Losses") directly or proximately resulting from Metricom's acts or omissions within the scope of this Use Agreement, except to the extent arising from or caused by the negligence or willful misconduct of the City, its corporate authorities, officers, employees, agents, or contractors. The foregoing notwithstanding, under no circumstances shall the issuance of any permit or certificate provided for under the City Municipal Code to Metricom or another person or entity constitute an act of negligence or willful misconduct. Nothing set forth in this Use Agreement shall be deemed a waiver by the City of any defenses or immunities relating to Metricom or its property, or to any other person or entity or their property, that are or would be otherwise available to the City or its corporate authorities, officers and employees under the provisions of the Illinois Local Government and Governmental Employees Tort Immunity Act, or that are otherwise available to local governments and their corporate authorities, officers and employees under the common law of the State of Illinois or the United States of America. The provisions of this Section 6 and each of its further subsections shall survive the expiration or earlier termination of this Use Agreement or renewal thereof.

6.1 **Waiver of Claims.** Metricom waives any and all claims, demands, causes of action, and rights it may assert against the City on account of any loss, damage, or injury to any Radio or any loss or degradation of the Services as a result of any event or occurrence which is beyond the reasonable control of the City. Actions by persons or entities other than the City or its corporate authorities, officers or employees shall be deemed beyond the reasonable control of the City.

6.2 **Limitation of City's Liability.** The City shall be liable only for the cost of repair to damaged Radios arising from the willful or wanton misconduct of City, its corporate authorities, officers or employees.

7 **INSURANCE.** Metricom shall obtain and maintain at all times during the term of this Use Agreement commercial general liability insurance and commercial automobile liability insurance protecting Metricom in an amount not less than One Million Dollars (\$1,000,000) per occurrence (combined single limit), including bodily injury and property damage, and in an amount not less than One Million Dollars (\$1,000,000) annual aggregate for each personal injury liability and products-completed operations.

Such insurance policies shall name the City as an additional insured as respects any covered liability arising out of Metricom's performance of work under this Use Agreement. Coverage shall be in an occurrence form and in accordance with the limits and provisions specified herein. Claims-made policies are not acceptable. When an umbrella or excess coverage is in effect, coverage shall be provided in the following form. Such insurance shall not be canceled or materially altered to reduce the policy limits until the City has received at least thirty (30) days' advance written notice of such cancellation or change. Metricom shall be responsible for notifying the City of such change or cancellation.

7.1 Filing of Certificates and Endorsements. Prior to the commencement of any work pursuant to this Use Agreement, Metricom shall file with the City the required original certificate(s) of insurance with endorsements, which shall clearly state all of the following:

(a) the policy number; name of insurance company; name and address of the agent or authorized representative; name, address, and telephone number of insured; project name and address; policy expiration date; and specific coverage amounts;

(b) that the City shall receive thirty (30) days' prior notice of cancellation; and

(c) that Metricom's insurance is primary as respects any other valid or collectible insurance that the City may possess, including any self-insured retentions the City may have; and any other insurance the City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance.

The certificate(s) of insurance with endorsements and notices shall be mailed to the City at the address specified in § 8 below.

7.2 Workers' Compensation Insurance. Metricom shall obtain and maintain at all times during the term of this Use Agreement statutory workers' compensation and employer's liability insurance in an amount not less than Five Hundred Thousand Dollars (\$500,000) or such higher amount as may be required by law during the term or renewal thereof of this Use Agreement, and shall furnish the City with a certificate showing proof of such coverage.

7.3 Insurer Criteria. Any insurance provider of Metricom shall be admitted and authorized to do business in the State of Illinois and shall be rated at least A:X in *A.M. Best & Company's Insurance Guide*. Insurance policies and certificates issued by non-admitted insurance companies are not acceptable.

7.4 Severability of Interest. Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved

by the City. "Cross liability," "severability of interest," or "separation of insureds" clauses shall be made a part of the commercial general liability and commercial automobile liability policies.

8 NOTICES. All notices which shall or may be given pursuant to this Use Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or email transmission, if a hard copy of the same is followed by delivery through the U. S. mail or by overnight delivery service as just described, addressed as follows:

if to the City:

CITY OF EVANSTON
Attn: Roger D. Crum
2100 Ridge Avenue
Evanston, Illinois 60201

if to Metricom:

METRICOM, INC.
Attn: Property Manager
980 University Avenue
Los Gatos, CA 95032

8.1 **Date of Notices; Changing Notice Address.** Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next day in the case of facsimile, email, or overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

9 **TERMINATION.** This Use Agreement may be terminated by either party upon forty five (45) days' prior written notice to the other party upon a default of any material covenant or term hereof by the other party, which default is not cured within forty-five (45) days of receipt of written notice of default (or, if such default is not curable within forty-five (45) days, if the defaulting party fails to commence such cure within forty-five (45) days or fails thereafter diligently to prosecute such cure to completion), provided that the grace period for any monetary default shall be ten (10) days from receipt of notice. For purposes of this Section, Metricom's abandonment of its Radios shall also be deemed a default if not cured within the time limit provided for in this Section. Except as expressly provided herein, the rights granted under this Use Agreement are irrevocable during the term.

10 **ASSIGNMENT.** This Use Agreement shall not be assigned by Metricom without the express written consent of the City, which consent shall not be unreasonably withheld,

conditioned, or delayed. Notwithstanding the foregoing, the transfer of the rights and obligations of Metricom hereunder to a parent, subsidiary, affiliated successor, or financially viable affiliate shall not be deemed an assignment for the purposes of this Use Agreement.

11 MISCELLANEOUS PROVISIONS. The provisions which follow shall apply generally to the obligations of the parties under this Use Agreement.

11.1 Nonexclusive Use. Metricom understands that this Use Agreement does not provide Metricom with exclusive use of the public right-of-way or any Municipal Facility and that the City shall have the right to permit other providers of telecommunications services to install equipment or devices in the public right-of-way and on Municipal Facilities; however, the City agrees to advise other providers of telecommunications services of the presence or planned deployment of the Radios in the public right-of-way and/or on Municipal Facilities.

11.2 Amendment of Use Agreement. This Use Agreement may not be amended except pursuant to a written instrument signed by both parties.

11.3 Severability of Provisions. If any one or more of the Provisions of this Use Agreement shall be held by court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such Provision(s) shall be deemed severable from the remaining Provisions of this Use Agreement and shall not affect the legality, validity, or constitutionality of the remaining portions of this Use Agreement. Each party hereby declares that it would have entered into this Use Agreement and each Provision hereof irrespective of the fact that any one or more Provisions be declared illegal, invalid, or unconstitutional.

11.4 Contacting Metricom. Metricom shall be available to the staff employees of any City department having jurisdiction over Metricom's activities twenty-four (24) hours a day, every day of the year without exception, regarding problems or complaints resulting from the attachment, installation, operation, maintenance, or removal of the Radios. The City may contact by telephone the network control center operator at telephone number (800) 873-3468 regarding such problems or complaints.

11.5 Governing Law; Jurisdiction. This Use Agreement shall be governed and construed by and in accordance with the laws of the State of Illinois, without reference to its conflicts of law principles. Terms or provisions herein shall not be construed against one party merely because that party is or was the principal drafter. If suit is brought by a party to this Use Agreement, the parties agree that venue for such action shall be vested exclusively in the state courts of Illinois, County of Cook, or in the United States District Court for the Northern District

of Illinois in such Division (Eastern or Western) thereof in which the City is located.

11.6 Attorneys' Fees. Should any dispute arising out of this Use Agreement lead to litigation, the prevailing party shall be entitled to recover its costs of suit, including reasonable attorneys' fees.

11.7 Exhibits. All exhibits referred to in this Use Agreement and any addenda, attachments, and schedules which may from time to time be referred to in any duly executed amendment to this Use Agreement are by such reference incorporated in this Use Agreement and shall be deemed a part of this Use Agreement.

11.8 Successors and Assigns. This Use Agreement is binding upon the successors and assigns of the parties hereto.

11.9 Advice of Displacement. To the extent the City has actual knowledge thereof, the City will attempt promptly to inform Metricom of the displacement or removal of any pole on which any Radio is located.

11.10 Consent Criteria. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Use Agreement, such party shall not unreasonably delay, condition, or withhold its approval or consent.

11.11 Waiver of Breach. The waiver by either party of any breach or violation of any Provision of this Use Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other Provision of this Use Agreement.

11.12 Representations and Warranties. Each of the parties to this Agreement represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith, except as provided in § 3.2 above.

11.13 Entire Agreement. This Use Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Use Agreement which are not fully expressed herein.

11.14 No Third-Party Beneficiaries. This Use Agreement creates no rights, title or interest in any person or entity whatsoever (whether under a third party beneficiary theory or otherwise) other than Metricom and the City, and their

respective officers, employees or other persons to the extent specifically named herein.

11.15 Reimbursement for Attorney Fees. Metricom acknowledges that the City has incurred costs for attorney fees and attorney time attributable to its consideration, review, and preparation of this Use Agreement and such ordinance, resolution or other material needed to have this Use Agreement approved and adopted by the corporate authorities of the City, including but not limited to attorney fees for use of outside legal counsel and/or the value or expense attributable to the actual time directly and reasonably spent on these matters by in-house legal counsel employed by the City. Metricom shall reimburse City for any attorney fees and costs that the City incurred or incurs directly and reasonably in connection with the review, preparation and approval of this Use Agreement in an amount not to exceed Two Thousand and no/100 Dollars (\$2,000.00). The City shall invoice Metricom for any reimbursement under this Section one time, either at the hourly rate billed by outside legal counsel or at a comparable hourly rate attributable to in-house legal counsel. Metricom shall pay the invoice within not more than forty-five (45) days after the date of the invoice.

11.16 Option to Use Other Agreements. In the event and each time that Metricom enters into an agreement, after the Effective Date and during the Term of this Use Agreement or renewal thereof, with another municipality located, in whole or in part, within the boundaries of Cook, DuPage, Kane, Lake, or McHenry Counties in the State of Illinois, that has a population equal to or less than the greater of either (a) the population of the City as adjusted during the term of this Use Agreement or extension thereof, or (b) 74,000, and that permits Metricom or its successors or assigns to use that municipality's Municipal Facilities in a manner similar to this Use Agreement, then, if such subsequent agreement contains terms, conditions or provisions relating to compensation different, in amount or kind from those contained in Section 4, inclusive of each of its Subsections, of this Use Agreement, Metricom shall inform the City in writing of such fact, and provide a copy of such agreement to the City. If, within ninety (90) days after receiving such notice, the City determines in the reasonable exercise of its discretion that such different provisions, if incorporated into this Use Agreement, will provide the City with rights that are more beneficial to the City than the rights and benefits provided for under Section 4, inclusive of each of its Subsections, and the City within the ninety (90) day period notifies Metricom that it desires to adopt the compensation provisions of such other agreement, Metricom agrees that it will amend this Use Agreement so that it contains terms relating to compensation and length of term, including any renewal terms, that are the same as in such subsequent agreement.

11.17 Signatures. This Use Agreement may be signed in counterparts.

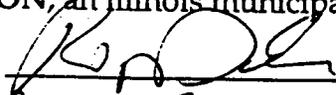
11.18 Taxation. The Municipal Facilities and the public right-of-way on which they are located are presently exempt from real estate taxes. In the event that this Use Agreement, any provision thereof, or any use of the public right-of-way or Municipal Facilities pursuant to the terms of this Use Agreement shall result in said right-of-way, Municipal Facilities or any parts thereof becoming subject to such real estate taxes, then Metricom shall be liable to the City for its payment of such taxes and shall reimburse the City for any such taxes paid within thirty (30) days invoice for same. Metricom shall have the right to contest all taxes, assessments, charges and impositions as it may become liable for under this Section, and the City agrees to join in such contest if required by law and to permit Metricom to proceed with the contest in the City's name, provided that the expense of the contest is borne solely by Metricom.

11.19 Relationship of the Parties. Metricom and the City shall be and act as independent contractors, and under no circumstances shall this Use Agreement be construed as one of agency, partnership, joint venture, or employment between the parties.

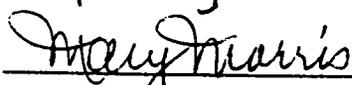
11.20 Advertising, Signs or Extraneous Markings. Metricom shall not place or cause to be placed any sort of signs, advertisements or other extraneous markings, whether relating to Metricom or any other person or entity, on any Radio or other equipment located on a Municipal Facility or in the public right-of-way, excepting such labels, numbers or other marks on the Radio(s) as are reasonably necessary to identify the Radio or Metricom for service, repair, maintenance or emergency purposes, or as may be otherwise required to be affixed by applicable law or regulation.

In witness whereof, and in order to bind themselves legally to the terms and conditions of this Use Agreement, the duly authorized representatives of the parties have executed this Use Agreement as of the Effective Date.

City: CITY OF EVANSTON, an Illinois municipal corporation

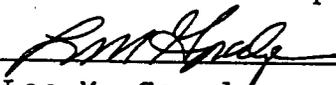
By: 
Roger D. Crum
(name typed)

Its: City Manager

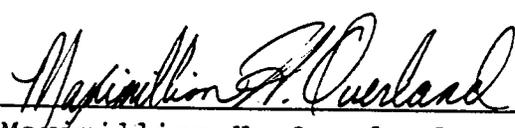
Attest: 
Mary Morris
(name typed)

Its: City Clerk

Metricom: METRICOM, INC., a Delaware corporation

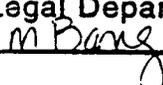
By: 
Lee M. Gopadze
(name typed)

Its: Senior Vice President, Field Ops Group

Attest: 
Maximillion H. Overland
(name typed)

Its: Right of Way Department Coordinator

Approved as to Form
ROW Legal Department

By:  Date: 01.25.99.

Am 1