

DBB Contract # _____

**FIBER OPTIC INDEFEASIBLE RIGHT TO USE
AGREEMENT BY AND BETWEEN
CITY OF WEST ST PAUL AS GRANTOR
AND
DAKOTA BROADBAND BOARD AS GRANTEE**

FIBER OPTIC INDEFEASIBLE RIGHT TO USE AGREEMENT

This Agreement for the indefeasible right to use (or “IRU”) together with the attached exhibit (collectively the “Agreement” or the “IRU Agreement”) is made by and between the City of West St Paul, a Minnesota municipal corporation (“IRU Grantor” or “the City”), and Dakota Broadband Board, a Minnesota independent joint powers organization, acting by and through its Board of Directors (“IRU Grantee”, or “the DBB”). The IRU Grantor and IRU Grantee may be referred to herein individually as a “Party” or collectively as the “Parties.”

BACKGROUND

- A. The City has installed and maintained, or plans to install and maintain, certain Fibers and Fiber Facilities, and
- B. The City is a participant in and a member of the Dakota Broadband Board and to further the purpose and goals of the DBB, the City agrees to grant to the DBB the right to use, manage and maintain Fibers and Fiber Facilities within certain Fiber Optic Cable segments on the terms and conditions set forth below.
- C. The DBB desires to use, manage and maintain optic Fibers and Fiber Facilities from the City as described in this Agreement.

DEFINITIONS

The following terms are used in this IRU Agreement:

- A. “County Right-of-Way” means the real property, including all fee simple, easements, access rights, rights of use and other interests, owned and/or operated by Dakota County, devoted to County road or highway purposes.
- B. “City Right-of-Way” means the real property, including all fee simple, easements, access rights, rights of use and other interests owned and/or operated by the City, devoted to City road or highway purposes.
- C. “Dakota Broadband Network” means a high-performance network connecting local government facilities in Dakota County with the physical assets (conduit, fiber optic cable, handholes, cabinets, network equipment) owned by DBB members but maintained and managed by the DBB.
- D. “Effective Date” is the date upon which all Parties have executed this Agreement.
- E. “Fiber” means a glass strand or strands which is/are used to transmit a communication signal along the glass strand in the form of pulses of light.
- F. “Fiber Facilities” means a handhole, conduit, splice enclosures and related equipment, but excluding any electronic or optronic equipment at termination points located in City facilities.

- G. "Fiber Optic Cable" or "Cable" means a collection of fibers with a protective outer covering.
- H. "IRU Assets" means the City's IRU conduit, IRU Cable, IRU Fibers and Fiber Facilities that is subject to this Agreement as more specifically described in Exhibit A.
- I. "IRU Cable" means a Cable containing one or more Fibers, constructed and owned by the City in which the DBB has an IRU pursuant to the terms of this Agreement.
- J. "IRU Fibers" means the specific City owned Fiber described in Exhibit A, an IRU for which is granted to the DBB in the IRU Cable pursuant to the terms of this Agreement.
- K. "Indefeasible Right of Use" or "IRU" means an indefeasible right to use, maintain and manage the IRU Fibers and Fiber Facilities, provided, however, that granting of such IRU does not convey legal title to the IRU Fibers or Fiber Facilities.
- L. "Optical Splice Point" means a point where the City's Cable is connected to another entity's Cable within a splice enclosure.
- M. "Relocation" means any physical movement of fiber optic cable or conduit required due to reconstruction, modification, change in grade, expansion or relocation of a County road or highway, or a city street or other public improvement.

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

ARTICLE I LICENSES

Section 1.1 The DBB desires to obtain an IRU in the City's IRU Assets further described in Exhibit A to this Agreement, which is incorporated into this IRU by reference. In consideration of the promises by the DBB in this Agreement, the City grants an IRU to the DBB in the IRU Assets identified in Exhibit A hereto, subject to any interests the City has previously granted to other cities or Dakota County, pursuant to IRUs or other contractual arrangements. The DBB shall be entitled to use the IRU Assets for any lawful purposes subject to (i) agreeing to be bound by all laws, regulations and any requirements of the City regarding access to City rights of way, and (ii) otherwise complying with the terms and conditions of this IRU.

Section 1.2 Subject to the terms and conditions of this IRU Agreement, City hereby grants to the DBB a license to access and use the IRU Assets during the term of this Agreement and any extension of this Agreement. The Parties acknowledge and agree that they may add additional IRU Assets owned by the City to become subject to this Agreement, and will agree upon an amended Exhibit A that reflects the changes to the City IRU Assets to be subject to DBB use and management, which shall supersede all previous versions of Exhibit A. Such amended Exhibit A

need not be formally approved by the DBB Board or the City Council of the City in order for the amendment to become effective.

Section 1.3 The IRU Assets are provided to the DBB “as is.” If any new Fiber Facilities or any fiber splices are needed to interconnect IRU Fibers to the Dakota Broadband Network, the DBB shall be responsible for coordinating this work with the City and shall pay any and all costs and fees associated with connecting the IRU Fibers to other fibers not owned by the City for Dakota Broadband Network purposes. The DBB and the city or cities that own the Dakota Broadband Network assets shall confer and agree upon which Party is responsible for the costs and fees associated with connecting the IRU Fibers to other fibers for Dakota Broadband Network purposes of parties outside of the DBB or shall agree upon an allocation of the costs and fees between the Parties. If the Parties cannot agree upon the responsibility for costs and fees related to Dakota Broadband Network connections, the issue shall be presented to the DBB Board and the DBB Board decision on cost responsibility shall be final.

Section 1.4 Notwithstanding anything contained to the contrary in this Agreement, the Parties acknowledge and agree nothing contained in this Agreement shall operate to limit, interfere with, or otherwise adversely affect each Party’s right to manage, control, construct, relocate, maintain, replace and expand the portion of its fiber optic network equipment and infrastructure that is not subject to this Agreement, and is not included in the description of Fiber and Fiber Facilities in Exhibit A.

ARTICLE II EFFECTIVE DATE AND TERM

The DBB may use the granted IRU Assets commencing on the Effective Date. This Agreement has an initial term of 10 years, with two separate five-year renewals which shall be effective unless the DBB Board affirmatively decides not to renew and provides ninety (90) days’ notice to the City prior to termination or unless terminated by agreement of the Parties in writing or by one of the events in Article XI, Section 11.2 of this Agreement, whichever occurs first.

ARTICLE III LICENSE FEES

The City will not impose, and the DBB shall not pay a fee for the use of the IRU Assets during the term of this Agreement on any renewal of this Agreement. The City will contribute to the cost of using, managing and maintaining the City’s Fiber Assets through its DBB participant fees and other financial contributions as approved by the DBB Board.

**ARTICLE IV
MAINTENANCE AND REPAIR**

The DBB shall be responsible for the maintaining, repairing and when necessary replacing the City's IRU Assets assigned to the DBB as described in Exhibit A within the Dakota Broadband Network managed by the DBB. Responsibility for the cost of maintenance and repair of new City Fiber Facilities used within the Dakota Broadband Network will be as follows:

If the City has amended Exhibit A of its IRU Agreement with the DBB to include the new Dakota Broadband Network/city fiber among the IRU Assets to be managed and maintained by the DBB, the cost of maintenance and repair of the new Dakota Broadband Network fiber is the responsibility of the DBB.

If the City has not amended Exhibit A of its IRU Agreement with the DBB to include the new city fiber among the IRU Assets to be managed and maintained by the DBB, the cost of maintenance and repair of the new Dakota Broadband Network/City fiber is the responsibility of the city until the new Dakota Broadband Network fiber is added to Exhibit A.

The response time to repair breaks or other failures causing an interruption in communications through City IRU Assets will be the response time standards set forth in the break/fix contract between the DBB, or its network administrator, and the selected break/fix repair contractor.

**ARTICLE V
REPRESENTATIONS AND WARRANTIES**

Section 5.1 The DBB's use of the IRU Assets shall comply with all applicable governmental codes, ordinances, laws, rules, regulations and/or restrictions.

Section 5.2 The City represents and warrants that it has the right to grant this IRU in its IRU Assets.

**ARTICLE VI
LIABILITY; INDEMNIFICATION**

Section 6.1 Neither the City nor the DBB shall be liable to the other for any indirect, special, punitive or consequential damages 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 hereto, its directors, officers, employees, servants, contractors and/or agents.

Section 6.2 The DBB assumes, releases and agrees to indemnify, defend, protect and save City (including its officers, agents, representatives and employees) harmless from and against any claim, damage, loss, liability, injury, cost and expense (including reasonable attorney's fees and expenses) in connection with any loss or damage to any person or property arising out of or resulting in any way from the acts or omissions to act, negligence or willful misconduct of the

DBB, its directors, officers, employees, servants, contractors and/or agents in connection with the exercise of its rights and obligations under the terms of this IRU.

The City assumes, releases and agrees to indemnify, defend, protect and save DBB (including its officers, agents, representatives and employees) harmless from and against any claim, damage, loss, liability, injury, cost and expense (including reasonable attorney's fees and expenses) in connection with any loss or damage to any person or property arising out of or resulting in any way from the acts or omissions to act, negligence or willful misconduct of the City, its directors, officers, employees, servants, contractors and/or agents in connection with the exercise of its rights and obligations under the terms of this IRU.

Notwithstanding the foregoing, such indemnity is limited to the amount of available insurance coverage and nothing herein shall be considered as a waiver of its statutory tort limits under Minn. Stat. Chap. 466.

Section 6.3 Nothing contained herein shall operate as a limitation on the right of either Party hereto 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 construction, operation or use of the Fiber, Cable, or IRU Fibers; provided, however, that (i) the Parties to this Agreement shall not have any claim against the other Party for indirect, incidental, special, punitive or consequential damages (including, but not limited to, any claim from any customer for loss of services), and (ii) each Party hereto 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 VII FORCE MAJEURE

The obligations of the parties hereto 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; acts of any governmental authority; condemnation or the exercise of rights of eminent domain; war or civil disorder; or any other cause beyond the reasonable control of either party hereto. 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.

ARTICLE VIII RELOCATION OF CABLE

Section 8.1 The City shall have the right to relocate the IRU Assets at any time upon written notice to the DBB (a "Relocation"). The City and/or Dakota County shall be responsible for all costs associated with a Relocation of the IRU Assets in County Right-of-Way that is required by alteration of the County Right-of-Way or by the request of a third party having authority to require

the move. The City may seek and receive funding or reimbursement from a third party for a Relocation within County Right-of-Way.

The City shall be responsible for all costs associated with a Relocation of its IRU Assets in City Right-of-Way that is required by alteration of the City Right-of-Way or by the request of a third party having authority to require the move. The City may seek and receive funding or reimbursement from a third party for a Relocation by the City.

Section 8.2 Either Party shall give the other Party at least sixty (60) days prior notice of any Relocation, if possible. The City has the right to determine the extent of, the timing of, and the methods to use for such Relocation; provided that any such relocated IRU Assets shall be constructed and tested in accordance with industry standard specifications and requirements. In addition, the City shall use reasonable efforts to ensure Relocation does not result in an adverse change to the operations, performance or connection points with the DBB Fiber Optic Cable network

Section 8.3 The DBB has the right to review the Relocation plans at least fourteen (14) days prior to commencement of any Relocation. Either party may submit comments on the Relocation plans, which comments shall not delay commencement of the Relocation. Both parties shall have the right to have a representative present at the time a Relocation occurs.

ARTICLE IX CONFIDENTIALITY

The Parties agree and recognize that this Agreement as well as information and documents the Parties receive from one another during the term of this Agreement may be considered public data under the Minnesota Government Data Practices Act, Minn. Stat. Ch 13, as amended. The Parties agree to comply with the Minnesota Government Data Practices Act as it applies to all data provided by the Parties under this Agreement, and as it applies to all data created, collected, received, stored, used, maintained, or disseminated by any Party under this Agreement. The civil remedies of Minn. Stat. § 13.08 apply to the release of the data referred to in this clause by any Party. If either Party receives a request to release data arising out of or related to the Fiber Facilities or the use, operation or maintenance thereof, the Party receiving the request must immediately notify the other Party of the request. The Parties will promptly consult and discuss the best way to respond to the request.

ARTICLE X ABANDONMENT; TERMINATION; EFFECT OF TERMINATION

Section 10.1 Should the City decide to abandon all or part of the IRU Fibers during the term of this Agreement, it may do so by providing sixty (60) days' notice informing the DBB in writing of its intent to abandon. Such abandonment shall be at no cost to either Party except as set forth in this Article. If the City provides notice of intent to abandon, the DBB may notify the City prior to the expiration of the notice period of its intent to take ownership of the IRU Fibers. If the

DBB provides timely notice of such intent, the Parties will execute any agreements or documents transferring legal title of the IRU Fibers to the DBB, at no cost to either Party.

Section 10.2 This Agreement shall terminate upon the first to occur of the following:

- (a) Expiration of the term of this Agreement;
- (b) Upon written notice from either Party to the other if a default occurs that is not cured within the time allowed hereunder, or
- (a) Upon a termination as provided in Section 10.4.

Section 10.3 If this Agreement terminates under Article X, Section 10.2(a), neither Party shall have any liability to the other Party for the use of the IRU Fibers; If this Agreement terminates under Article X, Section 10.2(b), the non-defaulting party shall not have any liability to the defaulting party, and the defaulting party shall be liable for such damages to the non-defaulting party as the non-defaulting party may establish in a court of law, except as limited by this Agreement. Upon termination of this Agreement for any reason, the Parties agree to promptly execute any documents reasonably required to effect such termination.

Section 10.4 The City may terminate this Agreement as to any IRU Assets owned by it with not less than two years prior written notice to the DBB. The DBB Board will consent to such termination unless the removal will render the Optical Fiber Dakota Broadband Network Backbone to be less than carrier class or violate any DBB contracts. The Parties recognize the two-year notice period is necessary and appropriate to permit the DBB to make alternative provisions for the continuance of service. The DBB Board may waive the two-year notice if it determines, in its sole discretion, that early termination will not adversely impact the Network.

Section 10.5 Upon termination of this Agreement for any reason, the DBB shall cease to have any rights to the IRU Assets or other rights under this Agreement or any obligations under this Agreement except for obligations under this Article and any other obligations that arose prior to such termination.

Section 10.6 If the City ceases to be a member of the DBB prior to the expiration or termination of this Agreement, this IRU Agreement will continue to be in effect until expiration.

ARTICLE XI DEFAULT

Section 11.1 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 written receipt of such notice; provided, however, that where a default cannot be reasonably cured within the thirty (30) day period, if 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 or until the default is cured, whichever is shorter.

Section 11.2 Upon the failure by 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 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.

**ARTICLE XII
NOTICES**

Section 12.1 Unless otherwise provided herein, all notices and communications concerning this Agreement shall be in writing and addressed as follows:

- If to the City: City of West St Paul
IT Department, Attn: James Grommersch
1616 Humboldt Avenue
West St Paul, MN 55118

- With a copy to: Levander, Gillen & Miller, P.A.
Attn: Kori Land, Attorney
633 Concord St S, Suite 400
South St Paul, MN 55075

- If to DBB: Dakota Broadband Board
Attn: Carah Koch, Executive Director
430 Third Street
Farmington, MN 55024

- With a copy to: Dakota Broadband Board Attorney: Paul Beaumaster
Dakota County Attorney's Office
1560 Hwy 55
Hastings, MN 55033

Section 12.2 Unless otherwise provided herein, notices shall be sent by certified U.S. Mail, return receipt requested, or by commercial overnight delivery service which provides acknowledgment 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 XIII
LIMITATION ON PROPERTY INTEREST**

This Agreement does not grant the DBB any property interest or estate in or lien upon the City's property, the City's Optical Fiber Network or any components thereof or any Intellectual Property, except for use of the IRU Assets during the term of this Agreement. All liens, claims and charges of the DBB shall not attach to any interest of the City or in any property owned by the City.

This Agreement does not grant the City any property interest or estate in or lien upon the DBB's property, its Optical Fiber Dakota Broadband Network or any components thereof or any Intellectual Property. All liens, claims and charges of the City shall not attach to any interest of the DBB or in any property owned by the DBB.

**ARTICLE XIV
GOVERNING LAW AND VENUE**

This Agreement shall be governed and construed in accordance with the laws of the State of Minnesota without regard to its conflict of laws provision. The Parties agree that any action arising out of this Agreement or with respect to the enforcement of this Agreement shall be venued in the Dakota County District Court, State of Minnesota.

**ARTICLE XV
INDEPENDENT CONTRACTOR**

The performance by the DBB and the City of all duties and obligations under this Agreement shall be as independent local government units and not as agents of the other Party, and no person employed or utilized by a party shall be considered the employee or agent 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 this Agreement does not create a partnership between, or a joint venture of the DBB and the City.

**ARTICLE XVI
MISCELLANEOUS**

Section 16.1 The headings of the Articles 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 IRU Agreement.

Section 16.2 When interpreting this Agreement, words used in the singular shall include the plural and the plural, the singular, and "of" is used in the inclusive sense, in all cases where such meanings would be appropriate.

Section 16.3 If any provision of this Agreement is found by any court of competent jurisdiction to be invalid or unenforceable, then the parties hereby waive such provision to the extent that it is found to be invalid or unenforceable and to the extent that to do so would not deprive one of the parties of the substantial benefit of its bargain. Such provision, to the extent allowable by law and the preceding sentence, shall not be voided or canceled, but instead will be modified by such court so that it becomes enforceable with all of the other terms of this Agreement continuing in full force and effect.

Section 16.4 This IRU Agreement may be amended only by a written instrument executed by all Parties.

Section 16.5 No failure to exercise and no delay in exercising, on the part of either Party hereto, any right, power or privilege hereunder shall operate as a waiver hereof, except as expressly provided herein. 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.

Section 16.6 All actions, activities, consents, approvals and other undertakings of the Parties in this IRU Agreement shall be performed in a reasonable and timely manner.

Section 16.7 Unless expressly defined herein, words having well known technical or trade meanings shall be so construed.

Section 16.8 This IRU Agreement is solely for the benefit of the parties hereto and their permitted successors and assigns.

**ARTICLE XVII
ENTIRE AGREEMENT**

This Agreement and any Exhibits referenced and attached hereto or to be attached hereto constitutes the entire agreement between the Parties and supersede any and all prior negotiations, understandings and agreements, whether oral or written.

IRU GRANTOR:

IRU GRANTEE:

CITY OF WEST ST PAUL

DAKOTA BROADBAND BOARD

By: _____
Its: Mayor
Date: _____

By: _____
Its: Board Chair
Date: _____

By: _____
Its: Clerk

Approved as to Form

Assistant County Attorney Date

EXHIBIT A

Description of City IRU Assets Subject to the IRU