

Contract #

FIBER OPTIC INDEFEASIBLE RIGHT TO USE  
AGREEMENT BY AND BETWEEN  
DAKOTA COUNTY AS GRANTOR  
AND  
CITY OF APPLE VALLEY AS GRANTEE

DRAFT

# FIBER OPTIC INDEFEASIBLE RIGHT TO USE AGREEMENT

This Agreement for the indefeasible right to use (or “IRU”) together with Attachments A and B, (collectively the “Agreement” or the “IRU Agreement”) is made by and between, County of Dakota, a Minnesota County government unit, acting by and through its Board of Commissioners (“IRU Grantor” or “County”) and City of Apple Valley acting through its, City Council (“IRU Grantee” or “City”). The IRU Grantee and IRU Grantor may be referred to herein individually as a “Party” or collectively as the “Parties.”

## BACKGROUND

- A. City desires to lease the use of two fibers from County to connect Redwood Park at 311 150<sup>th</sup> Street West, Apple Valley, MN to Apple Valley Municipal Center at 7100 147<sup>th</sup> Street West, Apple Valley, MN as described in this Agreement; and
- B. City desires to lease the use of two fibers from County to connect Kelley Park at 6855 Fortino Street, Apple Valley, MN to Apple Valley Municipal Center at 7100 147<sup>th</sup> Street West, Apple Valley, MN as described in this Agreement; and
- C. County agrees to grant to the City the right to use four fibers within certain Fiber Optic Cable segments on the terms and conditions set forth below:

## DEFINITIONS

The following terms are used in this Agreement:

- A. “Right-of-Way” means the real property, including all fee simple, easements, access rights, rights of use and other interests, owned by or operated by a government entity, devoted to road or highway purposes.
- B. “Effective Date” is the date upon which all Parties have executed this Agreement.
- C. “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.
- D. “Fiber Facilities” means a handhole, conduit, splice enclosures, and related equipment, but excluding any electronic or optronic equipment at termination points located in County facilities.
- E. “Fiber Optic Cable” or “Cable” means a collection of fibers with a protective outer covering.
- F. “IRU Assets” means the County’s IRU conduit, IRU Cable, IRU Fiber Facilities subject to this Agreement as more specifically described in Attachment A.
- G. “IRU Cable” means Cable containing one or more Fibers, constructed, and owned by the County in which the City has a IRU pursuant to the terms of this Agreement.
- H. “IRU Fibers” means the specific County owned Fiber in the locations described in Attachment A, for which an IRU is granted to the City in the IRU Cable pursuant to the terms of this Agreement.

- I. "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.
- J. "Optical Splice Point" means a point where the County's Cable is connected to another entity's Cable within a splice enclosure.
- K. "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 INSTALLATION AND LICENSES**

**Section 1.1** The City desires an IRU in the County's IRU Assets further described in Attachment A to this Agreement. In consideration of the promises by City in this Agreement, the County grants an IRU to City in the IRU Assets identified in Attachment A, which is attached hereto and incorporated herein by reference, pursuant to IRU's or other contractual arrangements. City shall be entitled to use the IRU Assets for any lawful government purposes subject to (i) agreeing to be bound by all laws, regulations, and any requirements of the access to rights of way, and (ii) otherwise complying with the terms and conditions of this Agreement. If City generates revenue by allowing third-party commercial use or permits use by a third party that generate revenue for that third-party from the use of IRU Assets, 100% of the revenue generated by use of the IRU Assets shall be paid to the County.

**Section 1.2** Subject to the terms and conditions of this Agreement, County hereby grants to City a license to access and use the IRU Fibers within the IRU Cable as delineated in Attachment A for City use in accord with and during the term of this Agreement. Along with any revenue articulated in Section 1.1, City shall be charged a monthly fee for the use of one pair in Segment 1 IRU Fibers of \$65 Dollars per mile per month per pair of strands over a distance of 1.8 miles for Segment 1 for a total of \$117 per month which is \$1,404 per year, and one pair in Segment 2 IRU Fibers of \$65 Dollars per mile per month per pair of strands over a distance of .43 miles for Segment 2 for a total of \$27.95 per month which is \$335.40 per year (collectively, the "License Fee"), as delineated in Attachments A and B. The License Fee shall be payable to the County in advance on or before each subsequent year from the Effective Date.

**Section 1.3** The License Fee is established by the County Board of Commissioners and is subject to modification during the Term of this Agreement, provided that the License Fee shall not be modified for a minimum of 5 years after the Effective Date of this Agreement. Thereafter, the License Fee may be modified based on the then-current License Fee established by the County Board. The County shall provide at least 60 days written notice to City prior to the effective date of any License Fee modification. City may accept the License Fee modification or may elect to terminate this Agreement and City's use of the Licensed Fibers at the end of the then-current annual year of any Term by providing written notice of termination to the County within 60 days

following the date of the County's notice. If City does not provide the notice of termination, the License Fee shall be effective and payable as modified for the next annual payment.

**Section 1.4** The IRU Fibers are provided to the City "as is." If any new Fiber Facilities or any fiber splices are needed to interconnect IRU Fibers to the City network, the City shall be responsible for coordinating this work with County and shall pay all costs and fees associated with connecting the IRU Fibers to other fibers not owned by County for City network purposes.

**Section 1.5** Notwithstanding anything to the contrary contained in this Agreement, the Parties acknowledge and agree nothing in this Agreement shall operate to limit, interfere with, or otherwise adversely affect either 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 Attachment A.

**Section 1.6** No Party may assign or transfer any rights or obligations under this Agreement without the prior consent of the other Party, which shall not be unreasonably delayed or withheld. If assignment of this Agreement is approved, an assignment agreement shall be fully executed and approved by the same Parties, or their successors in office. The Parties shall sign all papers and agreements needed to affect such transfer.

## **ARTICLE II EFFECTIVE DATE AND TERM**

The City may use the IRU Fibers commencing on the date the last party executes this Agreement. This Agreement has an initial term of ten (10) years, with two separate five-year renewal options. The City shall provide the County at least ninety (90) days' notice to renew. The County may terminate a renewal option by giving 6 months' advance notice to City prior to expiration of the preceding initial or first extension term, or unless this Agreement is otherwise terminated at any other point by agreement of the Parties in writing or by one of the events in Article IX, Section 9.2 of this Agreement.

## **ARTICLE III REPRESENTATIONS AND WARRANTIES**

**Section 3.1** City's use of the IRU Fibers shall comply with all applicable governmental codes, ordinances, laws, rules, regulations, and/or restrictions.

**Section 3.2** The County represents and warrants it has the right to grant an IRU in its IRU Fibers.

## **ARTICLE IV LIABILITY**

**Section 4.1** Neither City nor the County 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 4.2** To the extent permitted by law, County assumes, releases and agrees to indemnify, defend, protect and save the 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, negligence, or willful misconduct of County, its directors, officers, employees, servants, contractors, and/or agents in connection with the exercise of its rights and obligations under the terms of this Agreement.

To the extent permitted by law, the City assumes, releases and agrees to indemnify, defend, protect and save the County (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, 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 Agreement.

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

**Section 4.3** Nothing contained herein shall operate as a limitation on the right of either Party to bring an action for damages, including consequential damages, against any third party based on any acts or omissions of such third party as such acts or omissions may affect the construction, operation, or use of the Fiber Facilities, Cable, or IRU Fibers; provided, (i) neither Party to this Agreement shall 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 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 action against such third party.

**ARTICLE V  
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; condemnation or the exercise of rights of eminent domain; war or civil disorder; or any other cause beyond the reasonable control of either Party. The excused Party shall use reasonable efforts under the circumstances to avoid or remove such causes of non-performance and shall proceed to perform with reasonable dispatch whenever such causes are removed or ceased.

**ARTICLE VI  
MAINTENANCE, REPAIR, FEES /RELOCATION OF CABLE**

**Section 6.1** Maintenance. County shall maintain the IRU Fibers and Fiber Facilities or contract with a third party for maintenance, breaks and fixes. County agrees to be responsible for 100% costs in maintenance, breaks, and fixes in Segments 1 and 2 as described on Attachment A.

**Section 6.2** Fees. Neither Party will impose, and neither Party shall pay a fee, maintenance, or repair cost for the use of the Fiber Facilities and IRU Fibers during the term of this Agreement except as outlined in Attachment B.

**Section 6.3** Future Splicing. Costs for future splicing shall be the responsibility of the Party requesting the splicing. Splicing shall be performed by a contracted third party as agreed by the Parties.

**Section 6.4** Relocation. County will be responsible for relocation of Fiber Facilities.

**ARTICLE VII  
CONFIDENTIALITY**

The Parties agree and recognize 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 and all associated rules. 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 either 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 either 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 VIII**  
**ABANDONMENT; TERMINATION; EFFECT OF TERMINATION**

**Section 8.1** Should the County decide to abandon all or part of the IRU Fibers during the term of this Agreement, it may do so by providing six (6) months' notice informing City 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 County provides notice of intent to abandon, City may notify the County prior to the expiration of the notice period of its intent to take ownership of the IRU Fibers. If the City provides timely notice of its intent to take ownership, the Parties will execute any agreements or documents transferring legal title of the IRU Fibers to City. Each Party to bear their own costs associated with executing any agreements or documents to transfer legal title under this Article.

**Section 8.2** Should City decide it no longer requires use of the IRU Fibers during the term of this Agreement, it may terminate the agreement by providing sixty (60) days' notice informing the County in writing of its intent to terminate the IRU Agreement.

**Section 8.3** This Agreement shall terminate upon written notice from either Party to the other if a default occurs that is not cured within the time allowed hereunder, as determined by the County, the County may terminate this Agreement by providing notice to the City, which notice shall specify the effective date of termination.

**Section 8.4** If the Agreement terminates under Article VIII, Section 8.3 based on a Party's default, 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 affect such termination.

**ARTICLE IX**  
**DEFAULT**

**Section 9.1** Neither Party shall be in default under this Agreement unless and until the other Party shall have given the defaulting Party written notice of such default and the defaulting Party shall have failed to cure the default within thirty (30) days after receipt of such notice; provided, that where a default cannot reasonably be 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 9.2** 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 X  
NOTICES**

**Section 10.1** Unless otherwise provided herein, all notices and communications concerning this Agreement shall be in writing and addressed as follows:

If to City:  
City of Apple Valley  
Attn: City Administrator  
7100 147<sup>th</sup> Street West  
Apple Valley, MN 55124

If to County:  
Dakota County Board  
Attn: Deputy County Manager  
1560 Highway 55  
Hastings, MN 55033

With a copy to:  
Attorney  
Attn: City Attorney  
7100 147<sup>th</sup> Street West  
Apple Valley, MN 55124

With a copy to:  
Dakota County Attorney's Office  
Attn: Civil Division  
Dakota County Judicial Center  
1560 Highway 55  
Hastings, MN 55033

**Section 10.2** 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 XI  
LIMITATION ON PROPERTY INTEREST**

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

This Agreement does not grant County any property interest, or estate, in or lien upon City's property, any optical fiber network owned by the City or any components thereof, or any intellectual property. All liens, claims, and charges of the County shall not attach to any interest of City or in any property owned by City.

**ARTICLE XII  
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 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 XIII INDEPENDENT CONTRACTOR**

The performance by County and the City of all duties and obligations under this Agreement shall be as independent local government unit and independent commercial operator 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, City and County.

### **ARTICLE XIV MISCELLANEOUS**

**Section 14.1** 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 14.2** 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 14.3** 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 14.4** This Agreement may be amended only by a written instrument executed by all Parties.

**Section 14.5** 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 14.6** 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 14.7** Unless expressly defined herein, words having well known technical or trade meanings shall be so construed.

**Section 14.8** This Agreement is solely for the benefit of the Parties hereto and their permitted successors and assigns.

**ARTICLE XV  
ENTIRE AGREEMENT**

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

**IRU GRANTEE:  
CITY OF APPLE VALLEY**

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

**IRU GRANTOR:  
DAKOTA COUNTY**

By: \_\_\_\_\_  
Deputy County Manager

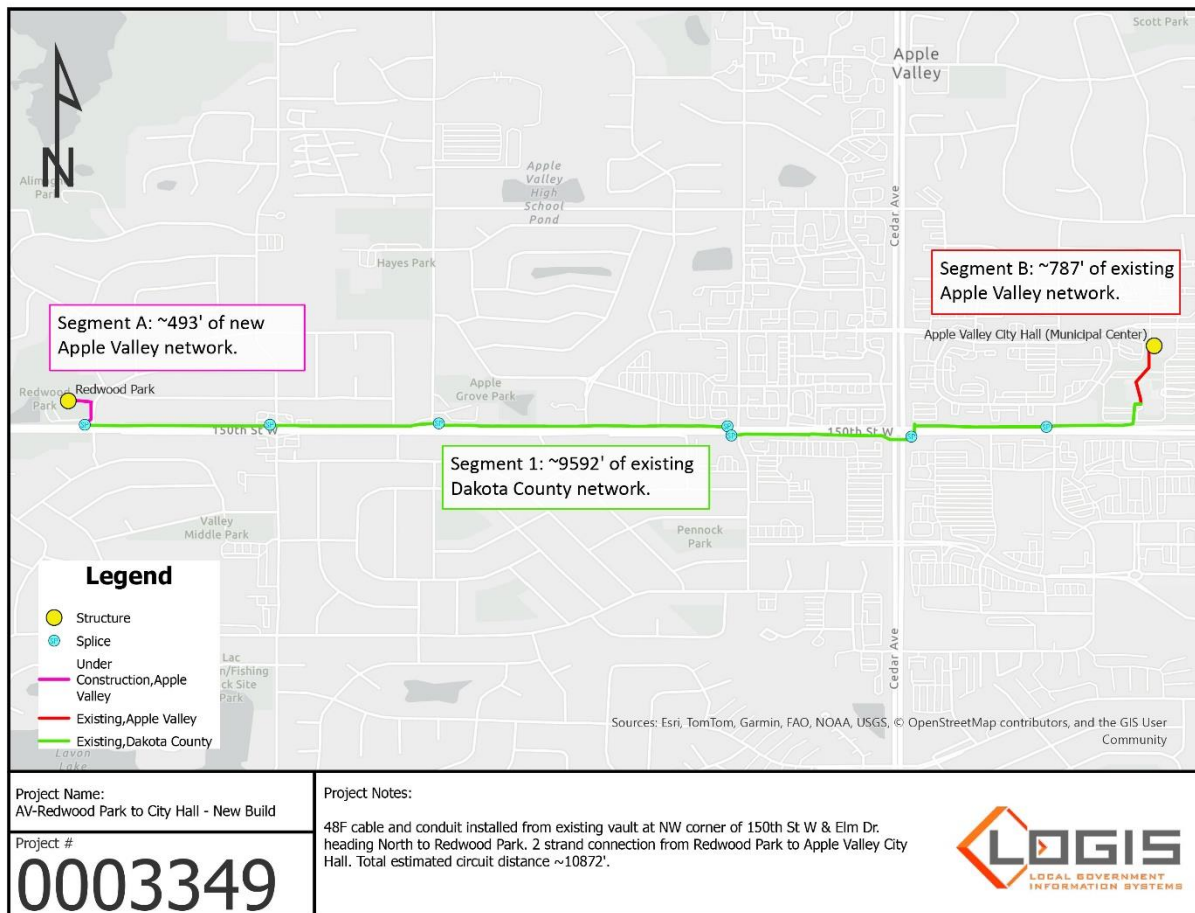
Date: \_\_\_\_\_

Board. Resolution: \_\_\_\_\_

# ATTACHMENT A - MAP OF FIBER SEGMENTS

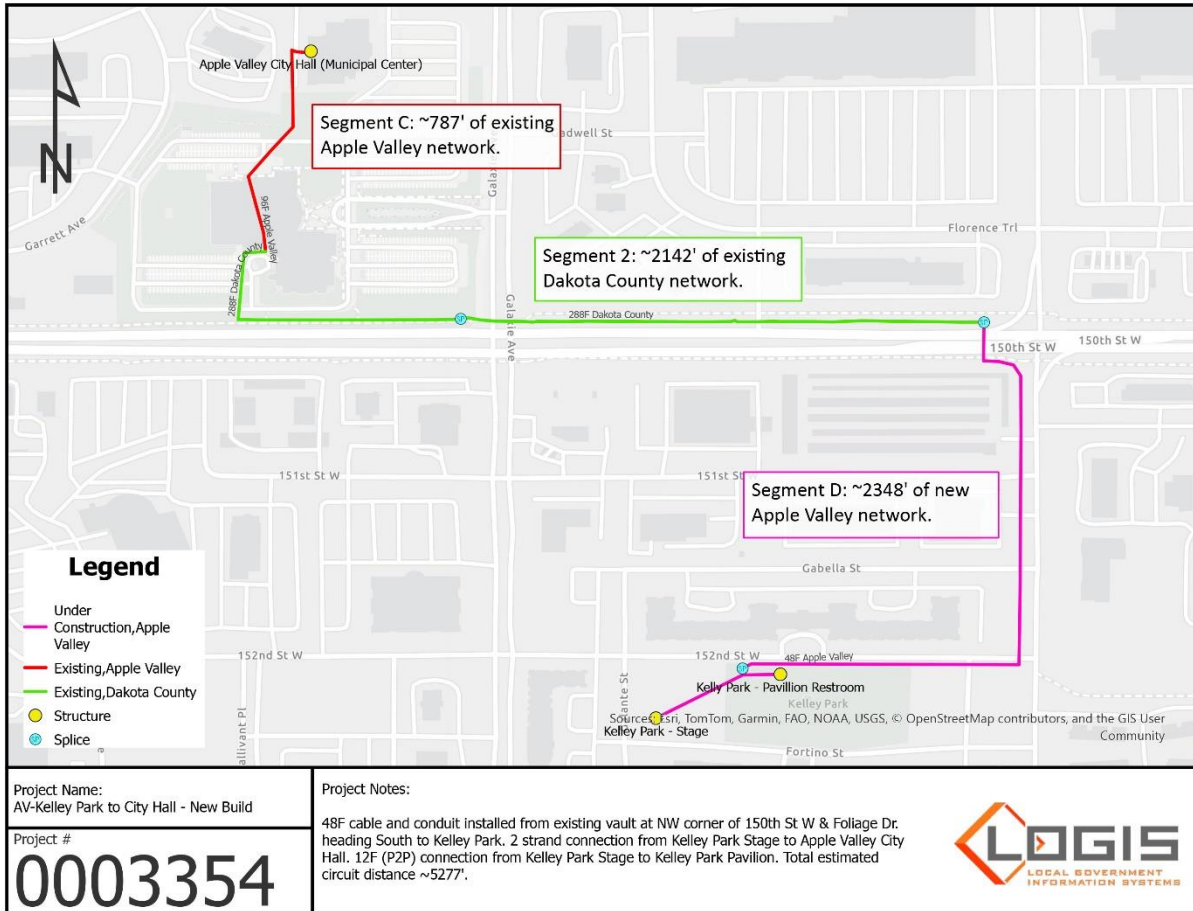
## Segment 1

This segment consists of two strands of fiber from Redwood Park at 311 150<sup>th</sup> Street West, Apple Valley, MN to Apple Valley City Hall at 7100 174<sup>th</sup> Street West, Apple Valley, MN, connecting City-owned fiber segments identified as segment A and segment B below.



## Segment 2

This segment consists of two strands of fiber from Kelley Park at 6855 Fortino Street, Apple Valley, MN to Apple Valley City Hall at 7100 174<sup>th</sup> Street West, Apple Valley, MN, connecting City-owned fiber segments identified as segment C and segment D below.



**ATTACHMENT B  
COST ALLOCATION AND PAYMENT LOGISTICS**

**Segment 1 – connection between Redwood Park and Apple Valley City Hall**

1.8 miles x \$65/pair/mile/month	\$117.00
12 months	\$1,404.00

**Segment 2 – connection between Kelley Park and Apple Valley City Hall**

.43 miles x \$65/pair/mile/month	\$27.95
12 months	\$335.40

**Yearly Total:           \$1,739.40**