

**FIBER OPTIC INDEFEASIBLE RIGHT TO USE**

**AGREEMENT BY AND BETWEEN**

**SOUTH ST PAUL AS GRANTOR**

**AND**

**DAKOTA COUNTY 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, the City of South St Paul, acting by and through its City Council (“IRU Grantor” or “SSP”) and the County of Dakota, a Minnesota County governmental unit acting through its, Board of Commissioners (“IRU Grantee” or “Dakota”). The IRU Grantee and IRU Grantor may be referred to herein individually as a “Party” or collectively as the “Parties.”

### **BACKGROUND**

SSP managed the Concord Avenue Road project and was a “dig once” opportunity. Dakota partnered with SSP for this road project by providing fiber materials for future traffic signal connectivity needs. SSP agreed to lead the project and SSP provided and added 288 strands of fiber for future fiber needs.

- A. Out of the 288 fiber strands that SSP originally provided, Dakota desires to own 144 fibers to connect, as described in this Agreement; and
- B. SSP agrees to grant to Dakota the right to own 144 fibers within certain Fiber Optical Cable segments on the terms and conditions set forth below; and
- C. Dakota agrees to grant to SSP the right to install and maintain the Fiber Optical Cable segments within conduit owned by Dakota 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 owned by Dakota, but excluding any electronic or optronic equipment at termination points located in Dakota facilities.
- E. “Fiber Optical Cable” or “Cable” means a collection of fibers with a protective outer covering.

- F. "IRU Cable" means a Cable containing one or more Fibers, constructed, and owned by SSP in which Dakota has an IRU pursuant to the terms of this Agreement.
- G. "IRU Fibers" means the specific SSP owned Fiber described in Attachment A, for which an IRU is granted to Dakota in the IRU Cable pursuant to the terms of this Agreement.
- H. "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.
- I. "Optical Splice Point" means a point where SSP's Cable is connected to another entity's Cable within a splice enclosure.
- J. "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** Dakota desires an IRU in SSP's IRU Cable further described in Attachment A to this Agreement. In consideration of the mutual promises in this Agreement, SSP grants an IRU to Dakota in the IRU Cable identified in Attachment A, subject to any interests SSP has in the cost sharing formula more fully described in Attachment B which is attached hereto and incorporated herein by reference, pursuant to IRUs or other contractual arrangements. Dakota shall be entitled to use the IRU Fibers 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.

**Section 1.2** Subject to the terms and conditions of this Agreement, SSP hereby grants to Dakota a license to access and use the IRU Fibers within the IRU Cable as delineated in Attachment A for Dakota use in accord with and during the term of this Agreement. Dakota shall own the use of 144 strands of fiber in Attachment A.

**Section 1.3** The IRU Fibers are provided to the Dakota "as is." If any new Fiber Facilities or any fiber splices are needed to interconnect IRU Fibers to the Dakota network, Dakota shall be responsible for coordinating this work with SSP and shall pay all costs and fees associated with connecting the IRU Fibers to other fibers not owned by SSP for the Dakota network purposes.

**Section 1.4** Subject to the terms and conditions of this Agreement, Dakota hereby grants to SSP a license to access and use the Fiber Facilities as delineated in Attachment A for the IRU Cable in accord with and during the term of this Agreement. The Fiber Facilities are provided to SSP "as is."

**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** Assignment. 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 term of this agreement shall begin on the date of execution of this Agreement by all Parties and shall remain in full force and effect for the useful life of the infrastructure, unless extended or sooner terminated hereunder.

## **ARTICLE III REPRESENTATIONS AND WARRANTIES**

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

**Section 3.2** SSP represents and warrants it has the right to grant an IRU in its IRU Cable.

**Section 3.3** SSP's use of the Fiber Facilities shall comply with all applicable governmental codes, ordinances, laws, rules, regulations, and/or restrictions.

**Section 3.4** Dakota represents and warrants it has the right to grant a license in its Fiber Facilities.

## **ARTICLE IV LIABILITY; INDEMNIFICATION**

**Section 4.1** Neither Dakota nor SSP 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, Dakota assumes, releases and agrees to indemnify, defend, protect and save SSP (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 Dakota, 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, SSP assumes, releases and agrees to indemnify, defend, protect and save Dakota (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 SSP, 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 Dakota's and SSP'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, 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. Dakota shall maintain the Fiber Facilities or contract with a third party for maintenance, breaks and fixes. Dakota agrees to be responsible for 100% costs in maintenance, breaks, and fixes in the Fiber Facilities. SSP shall maintain the IRU Cable or contract with a third party for maintenance, locates, breaks and fixes. SSP agrees to be responsible for 100% costs in maintenance, locates, breaks, and fixes in the IRU Cable.

**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 Cable 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.** Dakota will be responsible for relocation of conduit. Relocation costs for the IRU Cable shall be allocated based upon the proportion of fibers owned/licensed as outlined in Attachment A.

## **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 SSP 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 Dakota 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 SSP provides notice of intent to abandon, Dakota may notify SSP prior to the expiration of the notice period of its intent to take ownership of the IRU Fibers. If the Dakota 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 Dakota. 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 Dakota 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 SSP 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.

**Section 8.4** If the Agreement terminates under Article VIII, Section 8.3, 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 SSP:                      City of South St Paul  
   Attn: Ryan Garcia  
   City Administrator  
   125 3<sup>rd</sup> Avenue North  
   South St Paul, MN 55075  
   (651) 554-3278  
   [rgarcia@southstpaul.org](mailto:rgarcia@southstpaul.org)

With a copy to:                South St Paul City Attorney  
   Attn: Amanda Johnson  
   Levander, Gillen & Miller P.A.  
   1305 Corporate Center Drive, Suite 300  
   Eagan, MN 55121  
   651-451-1831  
   [ajohnson@levander.com](mailto:ajohnson@levander.com)

If to County:                    Dakota County Board  
   Attn: Enterprise Finance & Information Services Director  
   1560 Highway 55  
   Hastings, MN 55033

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 Dakota any property interest, or estate in, or lien upon SSP's property, SSP's Optical Fiber Network, 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 Dakota shall not attach to any interest of SSP or in any property owned by SSP.

This Agreement does not grant SSP any property interest, or estate, in or lien upon Dakota's property, its Fiber Facilities, Optical Fiber Network or any components thereof, or any intellectual property. All liens, claims, and charges of SSP shall not attach to any interest of Dakota or in any property owned by Dakota.

**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 SSP and Dakota 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, SSP and Dakota.

**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:  
SOUTH ST PAUL**

**IRU GRANTOR:  
DAKOTA**

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

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

David McKnight  
EFIS Director

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

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

Its:

Approved as to Form

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

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Assistant County Attorney                      Date  
File No KS-24-261  
Brd. Resolution 24-407

**ATTACHMENT A -  
Description of Fiber Details, Ownership, and Use**



**Segment 1**

This segment consists of two empty conduits and vaults installed by Dakota and to be owned and maintained by Dakota. SSP used this infrastructure to install 288 strands in segment 1.

This Segment is located from Annapolis Street East to Interstate 494 along Concord Street, in South St. Paul, MN. Dakota will own strands 1-144 and, SSP will own strands 145-288 of the 288 strands in Segment 1.

**ATTACHMENT B  
COST ALLOCATION AND PAYMENT LOGISTICS**

SSP is to split the overall costs with Dakota using existing Dakota-owned conduit and vaults.

Total labor costs for the installation of fiber are not to exceed \$45,000

SSP's cost obligation= \$22,000

Dakota's cost obligation= \$22,000

Total cost for 288 strand single mode armored= \$40,201.80

SSP's cost obligation (144 fiber strands)= \$20,100.90

Dakota's cost obligation (144 fiber strands)= \$20,100.90

**Total Overall Cost for Each Entity:**

SSP = \$42,100.90

Dakota= \$42,100.90