

## **FIBER OPTIC INDEFEASIBLE RIGHT TO USE**

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## FIBER OPTIC INDEFEASIBLE RIGHT TO USE

THIS JOINT POWERS AGREEMENT (as amended from time to time, this “**Agreement**”) is entered into as of \_\_\_\_\_ (Effective Date), by and between the County of Dakota and \_\_\_\_\_ hereto (the “**Participants**”), pursuant to Minnesota Statutes, Section 471.59.

This Agreement for the indefeasible right to use (or “**IRU**”) together with the attached exhibit (collectively the “**IRU Agreement**”) is made by and between the Participants.

### BACKGROUND

- A. The Participants have installed and maintained certain Fibers and Fiber Facilities, and
- B. The Participants as former members of the Dakota Broadband Board permitted the shared use of fiber resources as identified on **Exhibit A**;
- C. The Participants desire a continued joint use of those assets as described in this Agreement.

### DEFINITIONS

The following terms are used in this IRU Agreement:

- A. “Effective Date” is the date upon which all Participants have executed this Agreement.
- B. “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.
- C. “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.
- D. “Fiber Optic Cable” or “Cable” means a collection of fibers with a protective outer covering.
- E. “IRU Assets” means the Participant’s conduit, Cable, Fibers and Fiber Facilities that is subject to this Agreement as more specifically described in Exhibit A.
- F. “IRU Cable” means the Participant’s Cable containing one or more Fibers described in Exhibit A.
- G. “IRU Fibers” means the specific Participant owned Fiber described in Exhibit A, which is subject to this IRU.
- 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 the Participant'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.
- K. "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 a city Participant, devoted to City road or highway purposes.
- L. "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.

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

## **ARTICLE I LICENSES**

**Section 1.1** The Participants desire to obtain an IRU as currently represented in Exhibit A, which is incorporated into this IRU by reference. A participant shall be entitled to use the identified IRU Assets for any government use (i) agreeing to be bound by all laws, regulations and any requirements of the Participant regarding access to that Participant's right of way, and (ii) otherwise complying with the terms and conditions of this IRU. Government use includes:

- ☐ Participant use of the system for governmental purposes.
- ☐ Non-Participant use of the System by federal, state, or local governmental entities for public purposes.
- ☐ Non-Participant use of the System by educational institutions.
- ☐ Use of the System by non-profit organizations (501©(3) that serve a public purpose.

For purposes of this Agreement economic development related activities are not included in government use.

**Section 1.2** If the Parties seek to use another Participant's IRU assets for a non-government use that will be done by separate agreement or an addendum to this Agreement.

**Section 1.3** The Participant Assets are provided "as is."

**Section 1.4** Notwithstanding anything contained to the contrary in this Agreement, the Parties acknowledge and agree that nothing contained in this Agreement shall operate to limit, interfere with, or otherwise adversely affect a Participant'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**

This Agreement has an initial term of 10 years, with two separate five-year renewals which shall be effective unless the Grantor affirmatively decides not to renew and provides one years' notice to the Grantee prior to termination.

## **ARTICLE III MAINTENANCE AND REPAIR**

The Participant's shall be responsible for the maintaining, repairing and when necessary replacing the Participant's IRU. Dakota County will be responsible for the maintenance of its assets and will charge a participant utilizing the impacted fiber a \$2,000 maintenance fee annually for such costs.

## **ARTICLE IV REPRESENTATIONS AND WARRANTIES**

**Section 4.1** The Participant's use of the IRU Assets shall comply with all applicable governmental codes, ordinances, laws, rules, regulations and/or restrictions.

**Section 4.2** The Participant's represents and warrants that it has the right to grant this IRU in its IRU Assets.

## **ARTICLE V LIABILITY**

**Section 5.1** No Participant 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 any Participant hereto, its directors, officers, employees, servants, contractors and/or agents.

**Section 5.2** Nothing contained herein shall operate as a limitation on the right of either Participant 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 Participants to this Agreement shall not have any claim against the other Participant 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 Participants 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 VI 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 VII Data Practices**

The Participants agree and recognize that this Agreement as well as information and documents the Participants 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. The Participants agree to comply with the Minnesota Government Data Practices Act as it applies to all data provided by the Participants under this Agreement, and as it applies to all data created, collected, received, stored, used, maintained, or disseminated by any Participant 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 Participant. If either Participant receives a request to release data arising out of or related to the Fiber or the use, operation or maintenance thereof, the Participant receiving the request must immediately notify the other Participant of the request. The Participants will promptly consult and discuss the best way to respond to the request.

## **ARTICLE VIII ABANDONMENT; TERMINATION; EFFECT OF TERMINATION**

**Section 8.1** Should a Participant 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 other participants in writing of its intent to abandon. Such abandonment shall be at no cost to either Party except as set forth in this Article.

**Section 8.2** 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 any Participant to the others if a default occurs that is not cured within the time allowed hereunder.

**Section 8.3** Upon termination of this Agreement for any reason, the non-owning Participants 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.

## **ARTICLE IX DEFAULT**

**Section 9.1** No Participant shall be in default under this Agreement unless and until another Participant gives written notice of such default to the defaulting party which the defaulting party failed to cure within thirty (30) days. 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 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:

**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 a Participant a property interest or estate in or lien upon another Participant's property, Optical Fiber Network or any components thereof or any Intellectual Property, except for use of the IRU Assets during the term of this Agreement.

## **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 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 XIII MISCELLANEOUS**

**Section 13.1** 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 13.2** 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 13.3** 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 13.4** This IRU may be amended only by a written instrument executed by all Parties.

**Section 13.5** No failure to exercise and no delay in exercising, on the part of a Participant hereto, any right, power or privilege hereunder shall operate as a waiver hereof, except as expressly provided herein. Any waiver by a Participant 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 the Participants.

**Section 13.6** All actions, activities, consents, approvals and other undertakings of the parties in this IRU shall be performed in a reasonable and timely manner.

**Section 13.7** Unless expressly defined herein, words having well known technical or trade meanings shall be so construed.

**Section 13.8** This IRU is solely for the benefit of the parties hereto and their permitted successors and assigns.

**ARTICLE XIV**  
**ENTIRE AGREEMENT**

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

**EXHIBIT A**

**List of Participants**

**EXHIBIT A**

**Description of Assets Subject to the IRU**

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