

FIBER OPTIC INDEFEASIBLE RIGHT TO USE
AGREEMENT BY AND BETWEEN
DAKOTA COUNTY AS GRANTOR
AND
CITY OF ROSEMOUNT 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 Rosemount 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 exchange the use of two fibers from County to connect Rosemount Police at 14041 Biscayne Avenue, Rosemount, MN to Western Service Center at 14955 Galaxie Avenue, Apple Valley, MN as described in this Agreement; and
- B. County desires to exchange the use of two fibers from City to connect Criminal Justice Network at Rosemount Police Department at 14041 Biscayne Avenue, Rosemount, MN to Western Service Center at 14955 Galaxie Avenue, Apple Valley, MN as described in this Agreement; and
- C. County agrees to grant to the City the right to use two fibers within certain Fiber Optic Cable segments, and the City agrees to grant the use of two fibers to the County 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. “City IRU Assets” means the City’s IRU conduit, IRU Cable, IRU Fiber Facilities subject to this Agreement as more specifically described in Attachment B.
- E. “County IRU Assets” means the County’s IRU conduit, IRU Cable, IRU Fiber Facilities subject to this Agreement as more specifically described in Attachment A.
- F. “City IRU Fibers” means the specific City owned Fiber described in Attachment B, for which an IRU is granted to the County pursuant to the terms of this Agreement.
- G. “County IRU Fibers” means the specific County owned Fiber described in Attachment A, for which an IRU is granted to the City pursuant to the terms of this Agreement.

- H. "Fiber Facilities" means a handhole, conduit, splice enclosures, and related equipment, but excluding any electronic or optronic equipment at termination points located in County and City facilities.
 - I. "Fiber Optic Cable" or "Cable" means a collection of fibers with a protective outer covering.
 - J. "IRU Cable" means Cable containing one or more Fibers, constructed, and owned by the Parties in which the Party has a IRU 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 Parties 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 INSTALLATION AND LICENSES

Section 1.1 The City desires an IRU in the County IRU Fibers further described in Attachment A to this Agreement. In consideration of the promises by Parties in this Agreement, the County grants an IRU to the City in two strands of the County IRU Fibers identified in Segment 1 on Attachment A. The City shall be entitled to use the County 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. If the 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 the County IRU Fibers, 100% of the revenue generated by use of the County IRU Fibers 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.

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

Section 1.4 The County desires an IRU in the City IRU Fibers further described in Attachment B to this Agreement. In consideration of the mutual promises by the County and City in this Agreement, City grants an IRU to the County in two strands of the City IRU Fibers as identified in Segment 2 on Attachment B. County shall be entitled to use the City 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. If the County 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 City IRU Fibers, 100% of the revenue generated by use of the City IRU Fibers shall be paid to the City.

Section 1.5 Subject to the terms and conditions of this Agreement, the City hereby grants to the County a license to access and use the City IRU Fibers within the City IRU Cable as delineated in Attachment B for County use in accord with and during the terms of this Agreement.

Section 1.6 The City IRU Fibers are provided to the County “as is.” If any new Fiber Facilities or any fiber splices are needed to interconnect the City IRU Fibers to the County network, the County shall be responsible for coordinating this work with the City and shall pay all costs and fees associated with connecting the City IRU Fibers to other fibers not owned by the City for County network purposes.

Section 1.7 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 the Attachments.

Section 1.8 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 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 pursuant to this Agreement.

ARTICLE III

REPRESENTATIONS AND WARRANTIES

Section 3.1 City’s use of the County 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 the County IRU Fibers.

Section 3.3 County's use of the City IRU Fibers shall comply with all applicable governmental codes, ordinances, laws, rules, regulations, and/or restrictions.

Section 3.4 The City represents and warrants it has the right to grant an IRU in the City 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 County 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 Segment 1 as described on Attachment A.

Section 6.2 Maintenance. City shall maintain the City IRU Fibers and Fiber Facilities or contract with a third party for maintenance, breaks and fixes. City agrees to be responsible for 100% costs in maintenance, breaks, and fixes in Segment 2 as described on Attachment B.

Section 6.3 Fees. Neither Party will impose, and neither Party shall pay a fee, maintenance, or repair cost for the use of the other Party's Fiber Facilities and IRU Fibers during the term of this Agreement, except as otherwise provided for in Section 6.4.

Section 6.4 In the event either Party abandons or otherwise terminates its right to use the other Party's IRU Fibers pursuant to this Agreement, the Parties shall confer and will amend this Agreement to permit the imposition of charges for the use of the remaining IRU Fibers according to the IRU grantor's then-current applicable rates.

Section 6.5 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 6.6 The City will be responsible for relocation of any City-owned Fiber Facilities that are part of Segment 1. The County will be responsible for relocation of any County-owned Fiber Facilities that are part of Segment 2.

ARTICLE VII GOVERNMENT DATA PRACTICES

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.

ARTICLE VIII

ABANDONMENT; TERMINATION; EFFECT OF TERMINATION

Section 8.1 Should the County decide to abandon all or part of the County 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 require amendment of this Agreement by removing its IRU in the County IRU Fibers. Such amendment shall not affect the County's IRU in the City IRU Fibers under this Agreement, except as provided in Section 6.4.

Section 8.3 Should the City decide to abandon all or part of the City IRU Fibers during the term of this Agreement, it may do so by providing six (6) months' notice informing County 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 City provides notice of intent to abandon, County may notify the City prior to the expiration of the notice period of its intent to take ownership of the City IRU Fibers. If the County provides timely notice of its intent to take ownership, the Parties will execute any agreements or documents transferring legal title of the City IRU Fibers to County. Each Party to bear their own costs associated with executing any agreements or documents to transfer legal title under this Article.

Section 8.4 Should County decide it no longer requires use of the City IRU Fibers during the term of this Agreement, it may require amendment of this Agreement by removing its IRU in the City IRU Fibers. Such amendment shall not affect the City's IRU in the County IRU Fibers under this Agreement, except as provided in Section 6.4.

Section 8.5 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 8.6 If the Agreement terminates 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 Rosemount
Attn: City Administrator
2875 145th 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
2875 145th Street West
Rosemount, 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 the County's property, County's IRU Assets, or any components thereof, or any intellectual property, except for use of the County IRU Fibers during the term of this Agreement. All liens, claims, and charges of the City shall not attach to any interest of the County or in any property owned by the County.

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

CITY OF ROSEMOUNT

By: _____

Its: _____

Date: _____

DAKOTA COUNTY

By: _____

Deputy County Manager

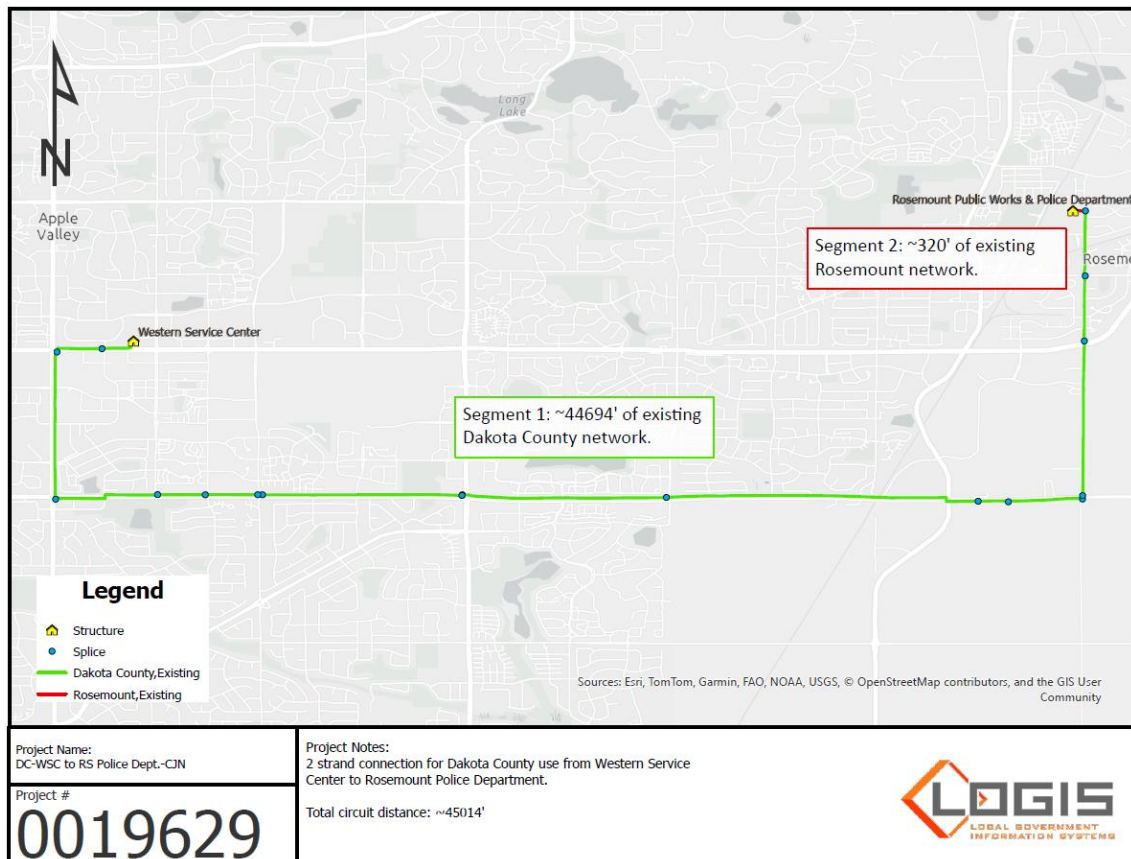
Date: _____

Board Resolution _____

ATTACHMENT A

Segment 1: Dakota County circuit used for CJN

Showing the fiber optic connection for County IRU Fibers between Rosemount Police Department at 14041 Biscayne Avenue, Rosemount, MN to Western Service Center at 14955 Galaxie Avenue, Apple Valley, MN.



Segment 1

This segment consists of 2 dark strands of fiber from the Western Service Center (14955 Galaxie Ave to Rosemount Police Dept. (14401 Biscayne Ave)

- Western Service Center: Rack 1, MP 112, Ports: 183-184
- County strands 183-184 from Western Service Center to Splice Point in SE corner of Cedar Ave & 160th.
- County strands 183-184 from splice point in SE corner of Cedar Ave & 160th to splice point in SE corner of 160th Ave & Biscayne Ave
- County strands 183-184 from splice point in SE corner of 160th & Biscayne Ave to splice point just north of the intersection of Biscayne Ave. & Birch St, connecting with City strands 5-6.

ATTACHMENT B

Segment 2: City of Rosemount circuit

Showing the fiber optic route for City IRU Fibers between Criminal Justice Network at Rosemount Police Department at 14041 Biscayne Avenue, Rosemount, MN to Western Service Center at 14955 Galaxie Avenue, Apple Valley, MN.



Segment 2

This segment consists of 2 dark strands of fiber from the Rosemount Police Dept. (14401 Biscayne Ave) to splice point at Biscayne Avenue and Birch Street.

- Rosemount Police Dept: Rack 3, MP 144, Ports 55-56.
- City strands 7-8 to splice point at Biscayne Avenue and Birch Street, connecting with County strands 185-186.