



# Dakota County

## General Government and Policy Committee of the Whole

### Agenda

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Tuesday, November 29, 2022

11:00 AM

Conference Room L139 Western Service  
Center, Apple Valley

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**This is a Special Meeting of the General Government and Policy Committee of the  
Whole,  
scheduled at 11:00 a.m. or following Governance Workshop**

**1. Call To Order And Roll Call**

Note: Any action taken by this Committee of the Whole constitutes a recommendation to the County Board.

**2. Approval Of Agenda (Additions/Corrections/Deletions)**

**2.1 Approval of Agenda (Additions/Corrections/Deletions)**

**REGULAR AGENDA**

**3. County Board/County Administration**

**3.1 County Board - Legislative Update**

**3.2 Budget - Update On The County Manager's 2023 Recommended Budget**

**4. Enterprise Finance and Information Services**

**4.1 EFIS Administration - Authorization To Withdraw From Dakota Broadband Board, Terminate Agreement For Financial Management Services And Approve Infeasible Right To Use Agreement**

**5. Adjournment**

**5.1 Adjournment**

**For more information, call 651-438-4417**

**Dakota County Board meeting agendas are available online at  
<https://www.co.dakota.mn.us/Government/BoardMeetings/Pages/default.aspx>  
Public Comment can be sent to [CountyAdmin@co.dakota.mn.us](mailto:CountyAdmin@co.dakota.mn.us)**



# General Government and Policy Committee of the Whole

## Request for Board Action

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**Item Number:** DC-1648

**Agenda #:** 2.1

**Meeting Date:** 11/29/2022

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Approval of Agenda (Additions/Corrections/Deletions)



# General Government and Policy Committee of the Whole

## Request for Board Action

Item Number: DC-1630

Agenda #: 3.1

Meeting Date: 11/29/2022

**DEPARTMENT:** Office of the County Manager

**FILE TYPE:** Regular Information

### TITLE

**Legislative Update**

### PURPOSE/ACTION REQUESTED

Provide an update on the 2023 State legislative session, State and Federal legislative affairs, and the status of County legislative priorities.

### SUMMARY

The Legislative Advisory Workgroup (LAW) and staff will provide updates on federal and state legislative affairs and activities, Minnesota Inter-County Association (MICA), Association of Minnesota Counties (AMC), National Association of Counties (NACo) activities, related County activities and other legislative topics of interest to Dakota County.

### RECOMMENDATION

Information only; no action requested.

### EXPLANATION OF FISCAL/FTE IMPACTS

- ☒ None ☐ Current budget ☐ Other  
☐ Amendment Requested ☐ New FTE(s) requested

### RESOLUTION

Information only; no action requested.

### PREVIOUS BOARD ACTION

None.

### ATTACHMENTS

Attachment: None.

### BOARD GOALS

- ☐ A Great Place to Live ☐ A Healthy Environment  
☐ A Successful Place for Business and Jobs ☒ Excellence in Public Service

### PUBLIC ENGAGEMENT LEVEL

- ☐ Inform and Listen ☐ Discuss ☐ Involve ☒ N/A

### CONTACT

Department Head: Matt Smith

Author: Nathan Hanson





# General Government and Policy Committee of the Whole

## Request for Board Action

Item Number: DC-1632

Agenda #: 3.2

Meeting Date: 11/29/2022

**DEPARTMENT:** Budget

**FILE TYPE:** Regular Information

### TITLE

**Update On The County Manager's 2023 Recommended Budget**

### PURPOSE/ACTION REQUESTED

Receive an update on December changes for the 2023 County Manager's Recommended Budget and provide follow-up on questions and requests for information from the November Budget Workshops.

### SUMMARY

Several changes have been made to the County Manager's Recommended Budget as a result of increased grant awards.

Attachment for 2023 Preliminary December Changes provides a list of these changes, which have no net effect on the previously recommended County levy increase of 1.9 percent.

During the November Budget Workshops the County Board requested more information and follow-up on budget requests for mobile hotspots and general duty patrol deputies. Staff will present options for incorporating these requests into the 2023 budget.

### RECOMMENDATION

Information only; no action requested.

### EXPLANATION OF FISCAL/FTE IMPACTS

- |  |   |                                |
|--|---|--------------------------------|
| <input checked="" type="checkbox"/> None     | <input type="checkbox"/> Current budget       | <input type="checkbox"/> Other |
| <input type="checkbox"/> Amendment Requested | <input type="checkbox"/> New FTE(s) requested |                                |

### RESOLUTION

Information only; no action requested.

### PREVIOUS BOARD ACTION

None.

### ATTACHMENTS

Attachment: 2023 Preliminary December Changes

### BOARD GOALS

- |  |   |
|--|---|
| <input type="checkbox"/> A Great Place to Live                               | <input type="checkbox"/> A Healthy Environment        |
| <input checked="" type="checkbox"/> A Successful Place for Business and Jobs | <input type="checkbox"/> Excellence in Public Service |

**PUBLIC ENGAGEMENT LEVEL**

☐ Inform and Listen

☐ Discuss

☐ Involve

☒ N/A

**CONTACT**

Department Head: Paul Sikorski

Author: Karen Cater

2023 Operations December Changes

Change	Department	FTE	Revenue	Expense	NCC	Notes
SNAP DIAL Phone System	E&EA	-	\$ 523,950	\$ 523,950	-	Board Resolution 22-401
Organics SCORE Funding	Environmental Resources		2,349	2,349		
Crisis American Rescue Plan Funding	Social Services		(348,875)			
Crisis Department of Human Services Funding	Social Services		348,875			
Total Operating Changes to 2023 Recommended Budget		-	\$ 526,299	\$ 526,299	-	



# General Government and Policy Committee of the Whole

## Request for Board Action

Item Number: DC-1635

Agenda #: 4.1

Meeting Date: 11/29/2022

**DEPARTMENT:** Enterprise Finance and Information Services Administration

**FILE TYPE:** Regular Action

### TITLE

**Authorization To Withdraw From Dakota Broadband Board, Terminate Agreement For Financial Management Services And Approve Indefeasible Right To Use Agreement**

### PURPOSE/ACTION REQUESTED

Authorize withdrawal from the Dakota Broadband Board, approve Indefeasible Right to Use Agreement and termination of the financial management services agreement with the Dakota Broadband Board.

### SUMMARY

In 2017, Dakota County entered into a joint powers agreement (JPA) (Attachment) to create the Dakota Broadband Board (Resolution No. 17-651; December 12, 2017), to administer the County's institutional fiber network for the benefit of local governments in Dakota County.

At the Dakota Broadband Board meeting on July 13, 2022, the board directed the Interim Executive Director to work with the Dakota County City/County Managers Association to prepare a dissolution plan for the Dakota Broadband Board to consider at a later date.

A draft dissolution plan was developed by the Interim Executive Director and presented to the Dakota Broadband Board at their meeting on November 9, 2022. At that meeting, a motion was made and approved to table consideration of the dissolution plan by the board until May 1, 2023 to allow time to prepare a more complete and detailed plan and to accomplish various pre-dissolution tasks before voting on the dissolution plan. The JPA requires the approval of a dissolution plan (requiring a simple majority vote) before a vote to dissolve (using weighted voting and requiring a supermajority vote) can occur.

The JPA allows for two methods of withdrawing from the agreement. A participant that has not provided any system components may withdraw, effective immediately, by providing written notice to the chair of the board. A participant that has provided system components may withdraw by providing not less than an 18-month notice to the chair of the board and by paying a withdrawal payment. Under the terms of the JPA, a participant contributes system components to the Dakota Broadband Board by granting an Indefeasible Right to Use (IRU). The county has not granted an IRU to the Dakota Broadband Board to use county facilities as system components. One additional option is to see what occurs with the dissolution plan either continuing to offer to partner with interested cities or to operate independently.

Dakota County has an agreement with the Dakota Broadband Board to provide financial

management services to the organization (Attachment). If the decision is made to withdraw, notice should also be provided as required by the existing agreement to terminate the financial management services agreement. The agreement to provide services may terminate after 60-day notice, but the county must continue to provide the services for up to six months after termination to allow for transition of the services.

One final related issue is the ability for all the cities, who choose to continue to use of the county fiber network, to sign an indefeasible right to use agreement with Dakota County (Attachment). This agreement allows for the shared use of fiber resources as described in the agreement and clarifies that the County fiber network is for government use as defined in the agreement.

### RECOMMENDATION

Staff recommends the County Board withdraw from the Dakota Broadband Board effective immediately and the termination of the financial management services agreement with the Dakota Broadband Board. In addition, staff is recommending approval of both the indefeasible right to use agreement with each city that plans to continue to use the County fiber network going forward.

### EXPLANATION OF FISCAL/FTE IMPACTS

The County has budgeted for work and maintenance associated with County owned assets in the 2023 budget.

- |  |   |   |
|--|---|---|
| <input checked="" type="checkbox"/> None     | <input type="checkbox"/> Current budget | <input type="checkbox"/> Other                |
| <input type="checkbox"/> Amendment Requested |   | <input type="checkbox"/> New FTE(s) requested |

### RESOLUTION

WHEREAS, Dakota County has been a member of the Dakota Broadband Board since 2017; and

WHEREAS, the Dakota Broadband Board directed the Interim Executive Director to prepare a dissolution plan in July 2022 to be considered at a later date; and

WHEREAS, a draft dissolution plan was created and considered by the Dakota Broadband Board at the November 2022 board meeting; and

WHEREAS, the Dakota Broadband Board voted to table the consideration of the dissolution plan until May 1, 2023; and

WHEREAS, the Dakota Broadband Board joint powers agreement allows members who have not provided any system components to withdraw, effective immediately, by providing written notice to the chair of the board; and

WHEREAS, Dakota County provides financial management services to the Dakota Broadband Board; and

WHEREAS, Dakota County will require all cities who use the county fiber network to sign an indefeasible right to use agreement.

NOW, THEREFORE, BE IT RESOLVED, That the Dakota County Board of Commissioners hereby withdraws from the Dakota Broadband Board effective immediately and terminates the financial

management services agreement with the Dakota Broadband Board and directs the County Manager to provide written notice to the Dakota Broadband Board Chair; and

BE IT FURTHER RESOLVED, That the Dakota County Board of Commissioners approves the indefeasible right to use agreement with each city that plans to use the County fiber network going forward.

**PREVIOUS BOARD ACTION**

17-650; 12/12/17

**ATTACHMENTS**

Attachment: Financial Management Services Agreement

Attachment: Dakota Broadband Board Joint Powers Agreement

Attachment: Indefeasible Right to Use Agreement

**BOARD GOALS**

☐ A Great Place to Live

☐ A Healthy Environment

☐ A Successful Place for Business and Jobs

☒ Excellence in Public Service

**PUBLIC ENGAGEMENT LEVEL**

☐ Inform and Listen

☐ Discuss

☐ Involve

☒ N/A

**CONTACT**

Department Head: David McKnight

Author: David McKnight

**AGREEMENT BETWEEN  
THE DAKOTA BROADBAND BOARD AND DAKOTA COUNTY  
FOR FINANCIAL MANAGEMENT SERVICES**

**THIS AGREEMENT** is made and entered into by and between the Dakota Broadband Board (DBB) and the County of Dakota (collectively referred to as the Parties) pursuant to the authority vested in the Parties by Minn. Stat. §471.59, to improve the operation and management of publicly owned telecommunications assets throughout Dakota County.

**WHEREAS**, the DBB was created through a Joint Powers Agreement entered into by the cities of Apple Valley, Burnsville, Farmington, Hastings, Inver Grove Heights, Lakeville, Mendota Heights, Rosemount, South St. Paul, West St. Paul, the County of Dakota and the Dakota County Community Development Agency for the purpose of operating and managing publicly owned telecommunications assets in Dakota County; and

**WHEREAS**, Minn. Stat. § 471.59 authorizes two or more governmental units, by agreement, to jointly or cooperatively exercise any power common to the contracting parties or any similar powers; and

**WHEREAS**, the DBB is in need of financial management services to conduct its operations and Dakota County is willing to provide financial management services to the DBB during the term of this Agreement.

**NOW, THEREFORE**, in consideration of the mutual promises and benefits that each party shall derive from this agreement, and other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

**ARTICLE 1  
PURPOSES**

This Agreement has been executed by the parties for the sole purpose of designating Dakota County to receive and manage DBB funds, provide any and all budgetary, record keeping and accounting services necessary and convenient for the DBB, including contributions and grant monies awarded to the DBB, and to administer receipts and payments of funds required under contracts to which the DBB is a party.

**ARTICLE 2  
SERVICES**

**Section 2.1    Budget and Accounting Services**

A.     Dakota County shall provide budgeting and accounting services necessary to manage DBB funds, including financial contributions by DBB Members, revenues from other users of DBB-managed assets and grant monies. The financial services to be

provided by Dakota County are listed in Exhibit A, Scope of Work. Dakota County shall establish one or more separate funds for these monies and all interest earned from DBB funds shall be credited back to those same funds. All pertinent books, records, documents, and accounting procedures and practices shall be maintained by Dakota County and made available to the DBB, its Members, and the State Auditor upon reasonable notice and shall be retained consistent with the Dakota County's record retention schedule for financial records or the DBB records retention schedule for financial records, whichever is longer.

B. Funds provided to Dakota County by the DBB pursuant to this Agreement will be held in a separate account or accounts, and all interest earned on these accounts will be the property of the DBB.

Section 2.2 Accountability for Funds. All funds shall be accounted for according to generally accepted accounting principles. The DBB may request a report pertaining to the budgeting and accounting services provided by Dakota County pursuant to this Agreement.

Section 2.3 Indemnification. The DBB agrees to defend, indemnify and hold harmless Dakota County from all claims, demands, and causes of action of any kind or character, including the cost of defense thereof, resulting from the acts or omissions, including negligent acts or omissions, of DBB elected and non-elected officials, employees and agents in providing services under this Agreement. Nothing in this Section is intended by the parties as a waiver of any liability limits or immunities that the parties are otherwise entitled to under law. The requirements and obligations of this section shall survive the termination or expiration of this Agreement.

### ARTICLE 3 TERM OF AGREEMENT

Section 3.1 Term. The initial term of this Agreement shall begin on the date this Agreement is executed by all Parties and will continue until December 31, 2019. This Agreement will renew for an additional one (1) year term, on the 1<sup>st</sup> day of January every year thereafter commencing January 1, 2020, unless terminated earlier as permitted by Section 3.2 of the Agreement. The Parties agree that Dakota County will continue providing financial services to the DBB for six months following the termination of this Agreement to facilitate the transfer of financial records and assets to a successor financial management agent selected by the DBB and to complete all transactions and reporting required to close-out the financial management tasks for the previous fiscal year. The DBB will pay Dakota County fifty per cent (50%) of the annual fee paid to Dakota County for the prior calendar year for the services provided during the six-month close-out period, or a different amount mutually agreed to by the Parties.

Section 3.2 Termination. The agreement shall terminate upon the earliest of the following events:

A. Upon written agreement of all Parties;



- B. Upon sixty days written notice of intent to terminate by either party, delivered by first class mail to the other party.

**Section 3.3 Distribution of Property.** Upon termination of this Agreement, Dakota County will pay all outstanding DBB obligations from the funds managed by Dakota County pursuant to this Agreement. Any property or surplus money remaining in these funds after all such payments have been made shall be distributed to the DBB. The DBB and Dakota County will work cooperatively with grantors to transition all financial management obligations related to grants received by the DBB from Dakota County to the successor financial management agent. If a grantor will not permit a transfer of financial management tasks to a successor financial management agent, Dakota County shall continue to hold those specific grant monies and shall manage said monies in accordance with the terms of the grant agreements then in force which obligate Dakota County to hold and/or manage such grant funds. The DBB and Dakota County will negotiate a fee to be paid to Dakota County to manage grant funds through the close-out of the grant.

#### **ARTICLE 4 COMPENSATION**

The DBB shall make payments to Dakota County for services provided in the following amounts:

- A. From the Commencement of this Agreement to December 31, 2018 - \$7,000.
- B. From January 1, 2019 to December 31, 2019 – an amount agreed to by the Parties after considering the effort required from Dakota County to provide the services required under this Agreement in 2018. Effective January 1, 2020 and every year thereafter, the compensation will be adjusted by an amount agreed to by the Parties based upon the effort required to provide the financial services in previous year and Dakota County's increased labor costs.

If the DBB requests that Dakota County provide financial services outside the Scope of Work described in Exhibit A, the DBB and Dakota County will enter into a separate agreement for those services and the compensation to be paid for those services will be agreed upon by the Parties. Assistance provided by Dakota County staff to the DBB for applying, receiving and reporting on grants and grant expenditures is considered services outside the Scope of Work of this Agreement and will be billed and paid at an hourly rate to be agreed upon each calendar year by the Parties.

#### **ARTICLE 5 CONTACTS**

The contact persons for purposes of day-to-day operations and notifications are as follows, unless either party notifies the other in writing of a change in authorized contact person:

**Dakota Broadband Board**

The executive director of the DBB Board

**County of Dakota**

Peter Skwira  
Financial Services Director  
1590 Highway 55  
Hastings, MN 55033

**SECTION 6  
LIABILITY**

Each party to this Agreement shall be liable for the acts or omissions of its officers, directors, employees or agents and the results thereof to the fullest extent authorized by law and shall not be responsible for the acts of the other party, its officers, directors, employees or agents. It is understood and agreed that the provisions of the Municipal Tort Claims Act, Minn. Stat. Ch. 466, and other applicable laws govern liability arising from the parties' acts or omissions. In the event of any claims or actions asserted or filed against either party, nothing in this Agreement shall be construed to allow a claimant to obtain separate judgments or separate liability caps from the individual parties.

**SECTION 7  
MODIFICATIONS**

Any alterations, variations, modifications, or waivers of the provisions of this Agreement shall only be valid and binding when they have been reduced to writing, approved by their respective governing boards.

**SECTION 8  
MINNESOTA LAW TO GOVERN**

The Agreement shall be governed by and construed in accordance with the substantive and procedural law of the State of Minnesota, without giving effect to principles of conflicts of law. All judicial proceedings related to this Agreement shall be venued in the County of Dakota, State of Minnesota.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates indicated

DAKOTA BROADBAND BOARD

Date July 23, 2018

By George Tourville  
George Tourville, Chair

Approved by Dakota County  
Board of Commissioners

DAKOTA COUNTY

Date: 7-10-18

By Kathleen Gaylord  
Kathleen Gaylord, Chair  
Dakota County Board of Commissioners

Resolution No. 18-278

Approved as to Form

By [Signature]  
Assistant County Attorney

Date of Signature June 29, 2016

KS18-185 DBB-County Financial Services Agreement final

## EXHIBIT A

### SCOPE OF WORK

#### A. Financial System Administration:

1. Prepare monthly financial reports for Administrative Agent, Board of Directors and Executive Committee
2. Prepare all monthly, quarterly and annual journal entries
  - i. All revenue and A/R journal entries
  - ii. Cash and Investment activity
  - iii. Year-end adjustments
3. Maintain Capital Asset records – This includes but is not limited to the usage of asset inventory and other data to compute the annual distribution of operations and maintenance costs as envisioned in the System Plan. The capital asset is also used along with other data to compute the annual distribution of revenues computation again as conceived in the System Plan.
4. Assist with Grant project accounting. Also assist the DBB Administrative Agent and others in compiling grant financial information.
5. Prepare bank reconciliation on a monthly basis
  - i. General Checking Account
  - ii. Investment Accounts
6. Conduct annual audit services
  - a. Assist with solicitation and evaluation of audit service proposals
  - b. Assist independent auditors in conducting annual audit
  - c. Prepare all audit confirmations
  - d. Prepare all financial working papers for annual audit.
7. Prepare special financial reports as requested by the Administrative Agent, the Board of Directors and the Executive Committee. This includes but is not limited to providing detailed transaction information and providing advice on Dakota County's investment policy.

#### B. Accounts Receivable:

1. Prepares Invoices for Member contributions for operations and maintenance
2. Prepares Invoices for all C-Net users
3. Receives all payments and processes bank deposits

#### C. Accounts Payable:

1. Receives vendor invoices and submits to Administrative Agent for approval on a timely basis
2. Matches all purchase orders (if applicable) with invoice prior to payment

3. Reviews coding for accuracy
4. Computes and distributes Member shares of Revenue Received
5. Prepares all checks
6. Maintains all vendor records consistent with Dakota County's record retention schedule for financial records or the DBB records retention schedule for financial records, whichever is longer
7. Prepares check register for approval by the Board of Directors and or the Executive Committee

D. Budget:

1. Assist in the preparation of the annual budget
  - i. Revenue estimates
  - ii. Capital outlay
  - iii. Operating expenses
  - iv. Required member expense contributions
2. Report quarterly to the board and executive committee on budget variances.

E. Treasury Management:

1. Invest DBB funds in accordance with Dakota County's Investment Policy
2. Insurance: - Monitor and calculate prepaid balances on a monthly basis
3. Other:
  - i. Financial Management Agent is responsible for maintenance of all financial information in accordance with approved records retention schedule and regulations.
  - ii. Fiscal agent must submit all records for review in accordance with Data Practices Laws.
  - iii. Financial Management Agent is responsible for submitting all financial reports to state agencies including but not limited to State Auditor's Office.



**JOINT POWERS AGREEMENT  
DAKOTA BROADBAND BOARD**

**November 30, 2017**

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THIS JOINT POWERS AGREEMENT (as amended from time to time, this "Agreement") is entered into as of \_\_\_\_\_ (Effective Date), by and between the parties described on Schedule A attached hereto (the "Initial Participants"), pursuant to Minnesota Statutes, Section 471.59.

1. Statement of Purpose and Powers to be Exercised. The purpose of this Agreement is to provide for the joint exercise of the statutory powers common to the Participants (defined below), pursuant to Minn. Stat. § 471.59, to establish, operate, maintain and improve the System (defined below) for use by the Participants and potentially other users including, but not limited to: the power to enter into agreements necessary or convenient to the exercise of such powers; to establish fees and charges with respect thereto; to acquire, own and convey real or personal property; to issue bonds or obligations under any law under which the Participants may independently issue bonds or obligations, and use the proceeds of the bonds or obligations to carry out the purposes for which the bonds or obligations are issued; and to take such other actions reasonably necessary to the establishment, operation, maintenance and improvement of the System (together with other powers described herein, the "Joint Powers"). Notwithstanding any other provision of this Agreement, the joint powers organization created by this Agreement shall not have: any power of eminent domain; any taxing powers; any power to pledge the full faith or taxing power of any of the Participants for any purpose whatever; or to issue general obligation indebtedness of any Participant.

2. Manner of Exercising Powers; Creation of Dakota Broadband Board. The Joint Powers of the Participants will be exercised through a joint powers board, which is hereby created, to be designated the Dakota Broadband Board (the "Board"), having the powers and duties described herein. The Board is authorized to exercise the Joint Powers on behalf of and in cooperation with the Participants as provided herein.

3. Defined Terms. Capitalized terms used herein shall have the following meanings:

"Access Fee" means an annual fee paid by each Participant as described in the System Plan or bylaws of the Board, which will include, but not be limited to, a fee (which shall be an equal amount for each Participant) in exchange for the Participant's use of the I-Net.

"Access the System" or "Accessing the System" means that a Participant has at least one System Component that is connected to elements owned by other Participants and is relying on the Board to operate and maintain the System Component(s) on its behalf.

"Agreement" has the meaning given in Section 1 of this agreement.

"Annual Participation Fees" means all payments made to the Board by Participants including but not limited to Access Fees, the Basic Membership Fees and Operations and Maintenance Fees.

"Backbone" the central portion of the network consisting of redundant optical fiber ring segments interconnecting diverse communications network elements (switches, routers, etc.),

including connections at the colocation facility or facilities. Generally, the backbone capacity is greater than the networks connected to it.

"Basic Membership Fee" means an annual fee paid by a Participant regardless of whether or not it accesses any part of the System.

"Board" has the meaning given in Section 2 of this Agreement.

"C-Net" means the use of the System on any basis other than by the Participants for governmental purposes.

"CDA" means the Dakota County Community Development Agency and its successors and assigns.

"Drops" means the fiber optic cable and associated equipment necessary to serve individual retail customers. Drops typically begin at a handhole and terminate in the building of the retail customer.

"I-Net" means the use of the System by the Participants for governmental purposes.

"IRU" or "Indefeasible Right to Use" means agreements between a Participant and the Board, on behalf of itself and all other Participants, with respect to the use of System Components in which the Participant has an ownership or other legal interest.

"Initial Participant" has the meaning given in the Preamble of this Agreement.

"Joint Powers" has the meaning given in Section 1 of this Agreement.

"Lateral" means a fiber optic cable that is not part of the Backbone but instead extends fiber optic access into areas away from the Backbone.

"Operating and Maintenance Costs" means all expenses relating to the operation and maintenance of facilities controlled by the Board or used in connection with the System, including but not limited to, labor, contracted services, energy costs, monitoring costs, system configuration cost, switch-related costs, relocation costs, break repair costs, marketing costs, insurance, taxes, fees or similar charges.

"Participant" means the Initial Participants to the Agreement and each other qualified governmental unit satisfying the requirements of Section 4.B after the Effective Date of this Agreement, but excluding any governmental unit that has withdrawn from the Board pursuant to Section 4.D hereof.

"Supermajority" means a vote of two-thirds of the members of the Board, counted as one vote per member or on the basis of Weighted Voting, when required.

"System" means the telecommunication infrastructure necessary for the Participants to collectively provide more robust broadband, I-Net and C-Net services within Dakota County, including, without limitation, System Components and other network elements together with

contract rights and agreements necessary or convenient in connection with the operation, maintenance, development and use of such components.

"System Components" means the various necessary or convenient elements of the System, including, without limitation, fiber optic cables, hand holes, switches and routers.

"System Plan" means the plan defining both the physical aspects of the I-Net and C-Net System and the methods for funding or financing the costs associated with the operation, maintenance, and development of the System, as more fully described in Section 18 of this Agreement.

"Weighted Voting" means a vote of the Board in which each member's vote is weighted by the proportion that the Operations and Maintenance costs allocated to the Participant the member represents bears to the total Operations and Maintenance cost during the year in which the vote is taken; provided, however that no prevailing vote will pass without the support of at least three members.

"Withdrawing Participant" means a Participant that has given notice of its intent to withdraw from the Board pursuant to Section 4.D.

#### 4. Participant

A. *General.* A county, city, town, school district, or other local unit of government whose jurisdiction is within Dakota County, and who has the authority to exercise the Joint Powers under Minnesota Statutes may be a Participant.

B. *Additional Participants.* In addition to the Initial Participants, any government entity described in Section 4.A is eligible to be a Participant, subject to the prior approval of the Board, by:

i. executing and delivering to the Board a counterpart signature page to this Agreement, indicating its acceptance of the terms and conditions hereof;

ii. satisfying such other conditions mandated by the Board at the time as a condition to becoming a Participant.

C. *Annual Participation Fees.* The Board shall establish and collect, and the Participants shall pay non-refundable Annual Participation Fees. Withdrawing Participants shall continue to pay Annual Participation Fees due and payable during any required notice period under Section 4.D hereof. The Board shall not impose the Basic Membership Fee on the CDA unless the CDA is a Participant and is accessing the System.

#### D. *Withdrawal of Participants.*

i. A Participant that has not provided any System Components may withdraw, effective immediately, by providing written notice to the Chair of the Board.

ii. A Participant that has provided System Components may withdraw by providing not less than eighteen months advance written notice to the Chair of the Board, and by paying to the Board a "withdrawal payment." The withdrawal payment shall be determined through a good faith negotiation between the Board and the Withdrawing Participant. The purpose of the withdrawal payment is to require a Withdrawing Participant to pay actual and direct expenses incurred by the Board or another Participant which are reasonably related to the Withdrawing Participant's withdrawal including, without limitation, System Components relocation costs, leasing costs, and permit fees. If the Board and the Withdrawing Participant are unable to reach an agreement on the amount of the withdrawal payment, the disagreement shall be settled by binding arbitration, or in such other manner as is acceptable to the Board and the Withdrawing Participant. The amount of the withdrawal payment may be reduced to the extent the Withdrawing Participant and the Board enter into agreements which extend the Board's right to use System Components owned or controlled by the Withdrawing Participant. The provisions of Section 6.C hereof regarding termination of IRUs will continue to apply to Withdrawing Participants for the duration of any IRU.

iii. The withdrawal of a Participant will not, in and of itself, modify any IRUs or similar agreements executed by the Withdrawing Participant related to the use by the Board or other Participants of System components owned by the Withdrawing Participant. The term and termination of such IRUs and similar agreements are governed by the provisions in each individual IRU or similar agreement. In addition, each Withdrawing Participant shall remain liable for all financial liabilities incurred during the period it was a Participant, but shall not be liable for any new financial liabilities incurred after the date of delivery of its notice of withdrawal.

iv. Notwithstanding the eighteen month notice required for withdrawal under Section 4.D.ii above, the Board and the Withdrawing Participant may negotiate a shorter notice period in exchange for an additional payment by the Withdrawing Participant, designed to satisfy ongoing financial obligations of the Withdrawing Participant to the Board.

v. To the extent that IRUs granted by the Withdrawing Participant to the Board for System Components owned by the Withdrawing Participant continue beyond the withdrawal date, the obligations of the Withdrawing Participant to pay associated Operating and Maintenance Costs for such IRUs will survive withdrawal.

## 5. Board.

A. *Creation.* A joint powers board, known as the Dakota Broadband Board, is hereby established for the purposes contained herein with the powers and duties set forth in this Agreement.

B. *Members.* Each Participant that is accessing the System is entitled to appoint two members of its governing body as a member and an alternate member to the Board. The terms of each member and alternative member shall be as established in by-laws to be adopted by the Board, but in any event, shall terminate at such time as the member or alternate member ceases to be a member of the governing body of the applicable Participant.

C. *Committees.* The Board may appoint standing and ad hoc committees including, without limitation, an operations committee, with the powers to be described in the Board's bylaws.

D. *Governance-Voting.* As shall be required in bylaws to be adopted by the Board:

i. Actions of the Board will be taken by vote of the Board in which each member of the Board shall have one equal vote unless Weighted Voting is required. Decisions will be made by a majority of the votes cast except where a Supermajority is required.

ii. Weighted Voting is required: to approve or revise the System Plan; to approve periodic budgets, including required contributions to be made by each Participant in support of such budgets; to employ any personnel of the Board; and to approve the issuance of any bonds or debt obligations of the Board. In the case of the issuance of debt, an affirmative vote of two-thirds Supermajority of the votes cast is required.

iii. When weighted voting is required, the weight of each Participant's vote is determined by the Participant's proportional contribution to the total annual Operations and Maintenance costs of the Board in the year the vote is taken, multiplied by one hundred. In no event shall the total of the weighted votes be in excess of, or less than, one hundred (100). However, no prevailing vote will pass without the support of at least three Participants.

E. *Governance-Officers.* At its first meeting, and its first regular meeting of each subsequent year, the Board shall elect a Chair and Vice Chair from among the members designated by the governing bodies of the Participants. The Chair and Vice Chair shall be elected by the Board for one year terms. The Chair shall preside at all meetings of the Board and shall perform other duties and functions as may be determined by the Board. The Vice Chair shall preside over and act for the Board during the absence of the Chair.

F. *Purposes.* The Board shall: provide the structure for administrative and fiscal oversight of the System; set appropriate policies for the Board and the System; maximize the use of resources available to the various Participants for the benefit of the System; and establish and oversee any appropriate committees.



G. *Powers.* The Board shall have the general powers described in Section 1 of this Agreement, including the powers to do the following:

i. To negotiate and enter into contracts, including contracts: for the acquisition of real or personal property and equipment; employment of Board personnel, professional services and consultants; with wholesalers or resellers that desire to utilize the System;

ii. To acquire, construct, manage, maintain, or operate any interest in the System and any System Components;

iii. To apply for and hold any required licenses or permits;

iv. To sue and be sued;

v. To apply for, receive and utilize grants and loans;

vi. To accept donations;

vii. To issue bonds or debt obligations as permitted by law, by vote of a Supermajority of the Board, using Weighted Voting, provided that such obligations shall not constitute an obligation of any individual Participant;

viii. To promulgate, adopt, and enforce any rules and regulations, as may be necessary and proper to implement and effectuate the terms, provisions, and purposes of this Agreement.

H. *Additional Powers and Responsibilities.* In addition to the foregoing, the Board shall have the following specific powers and responsibilities, as further described and developed in the System Plan:

i. To approve contracts with commercial vendors regarding development, operation, marketing, public relations, maintenance and expansion of the System;

ii. To adopt an annual budget for operation and maintenance of, and capital improvements to, the System;

iii. To develop policies regarding accounting, contracting and procurement, employment, operations and maintenance, and asset replacement. The Participants expectation is that one or more of the Participants may provide financial accounting and or human resources services for the Board.

iv. To establish processes for setting the fees for Participants and non-Participants to access and use the System in accordance with the duly adopted System Plan and to administer the processes for setting fees that apply uniformly or equitably to all Participants;

- v. To acquire or lease real property as required for operations;
- vi. To discharge other duties consistent with the purposes of this Agreement or as required by law.

I. System Plan. A System Plan has been developed by the Participants in coordination with an outside consultant, Design Nine Broadband Planners, and titled "C-Net/I-Net Systems and Business Plan v7." The System Plan is fully incorporated into this Agreement by reference. The Board will formally adopt the System Plan at its first organizational meeting and may thereafter amend the System Plan from time to time as it deems appropriate. If there are any conflicts between the terms of this Agreement and the terms of the System Plan, the terms in this Agreement shall prevail. The vote to approve or modify the System Plan shall be by Weighted Voting.

6. Acquisition of Interests in System Components. The Board will acquire interests in the use of System Components as follows.

A. Participants will identify System Components for which they will grant to the Board IRUs with any qualifications or conditions, each of which will have an initial term of 10 years, with two five-year renewals which shall be automatic unless the Board affirmatively decides not to renew, by giving ninety (90) days' notice to the Participant prior to termination. In connection with, and as a part of the grant of each IRU, the Participant will grant to the Board all rights necessary or convenient for the Board to operate the System within the geographic boundaries of the Participant. The preceding sentence is not intended to grant to the Board prior approval of any permits required to be obtained in connection with any System Components to be constructed by the Board, provided however that such permits will not unreasonably be withheld by any Participant.

B. In connection with the grant by any Participant of an IRU to the Board for the benefit of the Participants as to any System Components, the Board will assume operating and maintenance costs and responsibilities with respect to such System Component.

C. With the prior consent of the Board, Participants may terminate an IRU as to any System Components owned by it with not less than two year's prior written notice to the Board. The Board will consent to such termination unless the removal will render the Backbone to be less than carrier class or violate any Board contracts. The Participants recognize that the two-year notice period is necessary and appropriate to permit the Board to make alternative provisions for the continuance of service. The Board may waive the two-year notice if it determines, in its sole discretion, that early termination will not adversely impact the System.

7. Ownership of System Components.

A. Each Participant retains the ownership interests it has in System Components, subject to the interests it grants to other Participants or the Board pursuant to IRUs or other contractual arrangements.

B. The Board recognizes that Participants may have partial ownership interests in System Components, or may have granted to third parties certain interests in such assets, which may limit the Participants' ability to dedicate or grant IRUs in such System Components.

C. The Participants' intent is that the Board will not own System Components unless in a specific situation the Board determines that it will construct and own certain System Components.

8. Expansion of System

A. Each Participant retains the authority to undertake and finance additional System Components to be owned by it, however each additional System Component that will be designated for operation and maintenance by the Board shall be constructed consistent with standards established by the Board and shall require prior review and approval as determined by the Board, in order to ensure that additions to the System will be undertaken in a coordinated manner. A decision to expand the System Components owned by a Participant remains with each Participant.

B. Each Participant must evaluate the financial viability for new System Components and System expansions. The Board will not participate in the cost of expansions to be owned by a Participant. The costs for new Laterals and Drops will be borne by individual Participants.

C. The Board may provide tools for Participants to expand the System by the addition of Laterals or Drops in accordance with the System Plan. This assistance would be in the form of technical assistance in implementation of the projects. The Dakota County Community Development Agency may provide financing assistance to Participants but will not participate in paying such costs.

9. Operating and Maintenance Cost Sharing. As is further described in the System Plan, Operating and Maintenance Costs will be separated into their logical parts. Responsibility for each cost category then will be shared by Participants based on distribution parameters appropriate for each category as determined by the Board.

Payment by Participants of their allocated share of Operating and Maintenance Costs will be in addition to the annual Access Fee. The Board shall use the Access Fees and Basic Membership Fees to offset a portion of the Operating and Maintenance Costs, as provided in the System Plan.



10. Financing Initial I-Net and Initial C-Net Capital Improvements

The following cost sharing provisions apply ONLY to the Initial Capital Projects. They do NOT apply to System expansions as described in Section 8. As is further described in the System Plan, Initial Capital Project costs will be shared as follows:

A. *Initial I-Net Capital Improvements Costs.* All municipal Participants and the CDA will pay for their own switches and their associated optics along with the fit-up costs relating to placement of the switches. Municipal Participants and the CDA will also pay for their own Drops and Laterals along with all associated splicing and other incidental costs, except that no municipal Participant or the CDA will be required to extend more than two thousand (2,000) feet of fiber optic cable to reach its primary access point. Each Municipal Participant will also contribute the same amount of funds as other Municipal Participants, with the equal share amount to be determined by the Board, to create an initial break/fix fund balance. Dakota County will pay for all other Laterals necessary to provide adequate access to the System for all Participants along with splicing and other costs associated with constructing the other Laterals. Dakota County will also pay for all costs related to the creation of the core nodes.

B. *Initial C-Net Capital Improvement Costs.* The CDA will pay for all costs relating to the Initial C-Net Capital Improvements as described in the System Plan.

11. Revenue Generation. As is further described in the System Plan, charges for use of the System will be imposed as follows.

A. *I-Net Usage and Charges.* Each Participant may use the System to the extent available within its boundaries for its own I-Net purposes on an unlimited basis, in exchange for annual payment of its Access Fee. Other than through the payment of the Access Fee, the Board shall not charge Participants for I-Net usage of the System.

B. *C-Net Revenues.* As further described in the System Plan, the Board will establish and collect charges for use of the C-Net, including different rates or charges for protected, versus unprotected, services. An amount equal to fifty per cent (50%) of revenue generated by C-Net usage will go the Participant in whose geographic limits the revenue is generated. An amount equal to forty five percent (45%) of revenue generated will be distributed pro rata to the Participants based on value of System assets provided by the Participants. An amount equal to 3.33% will be distributed pro rata to non-county members only based on their population. An amount equal to 1.67% will be distributed to Dakota County.

12. Establishment of a Relocation Fund; Submission of Capital Plans.

A. As further described in the System Plan, in the event of unanticipated need to relocate System fiber optic cable and associated structures and equipment, the CDA, at its option, may establish a fund which can be accessed by Participants for temporary construction financing on terms determined by the CDA. If the CDA creates a relocation fund, the Participants accessing relocation funds will repay the CDA beginning in the

Participant's next budget year. The intent of this fund is to provide temporary construction financing to be repaid in the next budget year. However, in the case of hardship, the CDA Board at its sole discretion may authorize a multi-year repayment plan. All fund repayments will include interest at a rate to be established by the CDA Board.

B. In order to minimize the unexpected need to relocate facilities, each Participant shall submit its Capital Improvements Plans relating to any System Components to the Board for review and comment prior to adoption thereof.

13. Default; Remedies. Upon the occurrence of any default hereunder, the Board and each Participant shall have any and all remedies available to it at law or in equity.

14. Liability; Indemnification.

A. *Responsibility for Own Acts and Omissions.* No Participant shall be liable for the acts or omissions of another Participant, unless it has specifically agreed in writing to be responsible for the same. Each Participant acknowledges and agrees that it is insured or self-insured consistent with the limits established in Minnesota State Statutes. Each Participant agrees to promptly notify all Participants if it becomes aware of any potential Board related claims or facts that are likely to give rise to such claims. Neither the Board nor any Participant shall have the power to do any act or thing the effect of which is to create a charge or lien against the property or revenues of the Board or another Participant, except as expressly provided herein or in any of the documents authorized herein.

B. *No Waiver.* Notwithstanding the foregoing, the terms of this Agreement are not to be construed as, nor operate as, waivers of a Participant's statutory or common law immunities or limitations on liability, including by not limited to, Minnesota Statutes Chapter 466. Further, the Participants' obligations set forth in this Agreement are expressly limited by the provisions of Minnesota Statutes Chapter 466 and Minnesota Statutes section 471.59, and any other applicable law or regulation providing limitations, defenses or immunities to the Participants and the Board. For purposes of determining total liability for tort damages, each Participant and the Board are considered a single governmental unit and the total liability for all of the Participants and the Board shall not exceed the limits on governmental liability for a single governmental unit as specified under Minnesota Statutes Section 466.04, Subd. 1, or as waived or extended by the Board or all Participants under Minnesota Statutes Sections 466.06 or 471.981.

C. *Indemnification.* The Board shall be considered a separate and distinct government joint powers entity to which the Participants have transferred all responsibility and control for actions taken pursuant to this Agreement. The Board shall comply with all laws and rules that govern a public entity in the State of Minnesota and shall be entitled to the protections of Minnesota Statutes Chapter 466. Without limiting the application of Section 14.A, to the extent of any liability insurance carried by the Board and available for such purpose, the Board shall defend, indemnify and hold harmless each Participant from any and all liability

arising from or as a result of: (i) any accident, injury to or death of any person or loss or damage to property that may be directly or indirectly caused by the acts or omissions of the Board; (ii) any act of the Board in the observation or performance of any of its responsibilities, or any failure by the Board to perform any such responsibilities; and/or (iii) any actions or inactions of Participants taken as a result of their membership on the Board. Nothing in this Agreement shall be construed to provide liability coverage or indemnification to an officer, employee, or volunteer of any Participant for any act or omission for which the officer, employee, or volunteer is guilty of malfeasance in office, willful neglect of duty, or bad faith. The Board shall carry insurance which provides for coverage equal to or greater than commercial general liability insurance in the amount of at least two million (\$2,000,000) dollars. If the Board employs any personnel, it shall also provide for worker's compensation benefits in the amount consistent with state statutes.

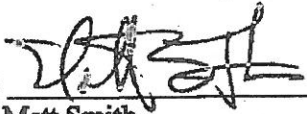
D. *Uninsured Liability.* If the Board incurs liability that is in excess of the insurance obtained by the Board, or incurs liability that is outside the coverage of such insurance, the liability shall be distributed among the Participants on the basis of each Participant's proportional contribution to the total Operations and Maintenance costs of the Board in the year in which the action or inaction giving rise to the liability has occurred.

15. Termination of Board; Disposition of Assets. This Agreement may be terminated, and the Board dissolved, upon the vote of a Supermajority of the Board using Weighted Voting. Prior to voting to terminate this Agreement, the Board shall adopt a plan providing for the orderly disposition of assets and unwinding of agreements of the Board. Such plan shall provide that following the disposition of any assets owned by the Board and the payment of all obligations of the Board, any funds remaining shall be distributed to the Participants who have not previously withdrawn in proportion to the total of all contributions made by the remaining Participants in place at the time of dissolution.

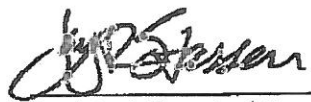
16. Amendments. This Agreement may be amended at any time and from time to time by agreement of all Participants who are members of the Board. Notwithstanding the foregoing, no amendment shall adversely affect the security for any bonds or debt obligations issued by the Board and outstanding at the time of the amendment.

IN WITNESS WHEREOF, each of the Participants has caused this agreement to be executed on its behalf by its respective authorized officers, all as of the date first above written.

DAKOTA COUNTY, MINNESOTA

By:   
Matt Smith  
County Manager  
1/5/18  
Date of Signature

Approved as to form

 1-4-2018  
Assistant County Attorney Date

File # KS17-419

Resolution # 17-650

KS17-419 JPA – Dakota Broadband Board vFinal

[Additional Participant Signature Pages to be added.]

**Schedule A**  
**Initial Dakota Broadband Participants**

City of Apple Valley  
City of Burnsville  
City of Farmington  
City of Hastings  
City of Inver Grove Heights  
City of Lakeville  
City of Mendota Heights  
City of Rosemount  
City of South St. Paul  
City of West St. Paul  
County of Dakota  
Dakota County Community Development Agency

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

DRAFT

## 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**

DRAFT



# General Government and Policy Committee of the Whole

## Request for Board Action

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**Item Number:** DC-1649

**Agenda #:** 5.1

**Meeting Date:** 11/29/2022

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Adjournment