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**EXECUTIVE SUMMARY**

**TITLE:** Fiber Lease Agreements

**RECOMMENDED ACTION:** Motion to approve authorization for the City Manager to enter into fiber strand and/or conduit lease agreements with other organizations for purposes of promoting economic development in the City of St. Louis Park.

**POLICY CONSIDERATION:** Does Council find acceptable the framework and elements of the fiber infrastructure leasing agreements presented herein as a means to promote economic development and additional choice of fiber providers? Is Council comfortable with similar agreements that accommodate opportunities to lease fiber conduit as well as strand capacity?

Note that the recommended action is consistent with one of the recommendations from a late 2012 fiber optic study – the opportunity to lease excess strands of dark (currently unused City-owned) fiber / conduit to the private sector to increase provider choice and support economic development in the City of St. Louis Park. This action is also consistent with the Council’s goal of making St. Louis Park a “Technology Connected Community”

**SUMMARY:** Council received a briefing on the fiber optic study at its October 22, 2012 study session. Among recommendations presented by Joanne Hovis from CTC Consulting was that the City consider fiber leasing arrangements with private providers to enable private investment / serve community anchor institutions. Staff has been pursuing this (and other) study recommendations. Staff has worked with the City Attorney and technical resources to craft template agreements that should allow the City to be prepared to respond to fiber leasing opportunities as they arise and with a streamlined approach.

**NEXT STEPS:** If the Council approves the recommended action staff will begin to engage with primarily private sector providers in lease agreements. This will enable the City Manager to approve fiber strand and/or conduit lease agreements as opportunities arise in the future. Staff will then work with at least one private party that has expressed on-going interest in entering into fiber lease agreements with the City.

**FINANCIAL OR BUDGET CONSIDERATION:** Implementation of fiber lease arrangements consistent with this structure is designed to (1) cover most associated implementation and maintenance costs, (2) promote economic development in the City of St. Louis Park, and (3) be in line with lease pricing offered by other comparable entities in the Twin Cities metro region.

**VISION AND GOAL CONSIDERATION:** St. Louis Park is committed to being a connected and engaged community. St. Louis Park is a technology connected community

**SUPPORTING DOCUMENTS:** Discussion  
Sample Indefeasible Right of Use (IRU)  
Sample Short Term License Agreement

**Prepared by:** Clint Pires, Chief Information Officer  
**Approved by:** Tom Harmening, City Manager

## **DISCUSSION**

**BACKGROUND:** As a refresher, the primary purpose of the 2012 fiber study was to identify what other community development purposes the publically-owned fiber infrastructure could serve beyond the institutional building needs of the City, Independent School District #283, and LOGIS (an intergovernmental cooperative of cities sharing IT resources).

Among many recommendations from the 2012 study, CTC recommended the City explore leasing of fiber capacity to enable private investment and support economic development. The City, Schools, and LOGIS have installed almost 40 miles of fiber infrastructure since 1998. Most major and minor institutional needs for fiber (data, voice, video, security, radio) have been met. More recently, the focus has been on enhancing fiber network resiliency by building redundant fiber paths. Construction season provides the greatest risk to severing of fiber networks. Thus, this redundancy has become all the more critical as reliance on the fiber network increases.

During the 2012 study, CTC and City staff reviewed current utilization of the fiber infrastructure's capacity, anticipated what remaining capacity is likely to be needed in the foreseeable future for spare capacity and additional uses, and identified what capacity would be available for potential leasing. In this case, "capacity" really means strands of fiber. The number of strands throughout the fiber infrastructure varies widely depending on location and need. It is often the case that only two – four strands of fiber are needed to support all digital functions at any particular City or School building. However, when fiber cable is installed, it typically includes many more strands and for a small or no incremental cost. That leaves many unused fiber strands that can be used by other private entities if the fiber is in locations they or their clients need. In that case, additional fiber cable does not need to be installed, saving the private entity construction and maintenance costs, and reducing additional disruption of public rights-of-way.

The typical instrument for private entity use of this fiber is a lease. This is nothing new in theory. It is very similar to the approach taken to provide use of space on elevated water towers by wireless phone carriers. That has been implemented for decades, including in St. Louis Park, and generally found to be much more cost-effective than the carriers building redundant tower facilities. In practice thus far, building of fiber facilities has been a blend of private providers (e.g., CenturyLink, Comcast, smaller companies) and other entities such as cities. The larger private providers have generally chosen to build, own, and maintain all of their own fiber infrastructure, while smaller companies have been the ones more likely to approach cities to lease fiber capacity in areas where they find that more cost-effective than building its own. That is what is happening in St. Louis Park. Over time, the City has been approached (unsolicited) by about 5 firms expressing such interest.

Staff would work with entities especially focused on economic development. Specifically, this would include working with providers of broadband services that are engaged with organizations wishing to locate or expand in St. Louis Park, and where availability of broadband services is vital.

To address typical lease arrangements between owners of fiber infrastructure and potential lessees, City staff and the City Attorney have drafted two agreement templates. One is called an Indefeasible Right of Use (IRU) that enables a long-term agreement between the City and lessees. It generally includes a large up-front payment followed by annual maintenance fees. The other is a short-term lease agreement (typically no more than 5 years) that includes monthly or annual payments to cover both lease and maintenance fees. Both agreement templates are crafted to

protect the City-owned fiber assets, while making their excess capacity available to private entities to promote economic development.

Both of these templates are attached. Final lease pricing is a moving target based on a variety of factors. However, such pricing will be consistent with economic development goals and pricing offered by other public sector entities in the Twin Cities metropolitan area as supported by pricing research conducted in the last 60 days.

**PRESENT CONSIDERATIONS:** Staff feels the time is right to have a structure in place to facilitate economic development supporting agreements relative to fiber infrastructure. In addition, staff is currently engaged in a couple complementary activities: (1) talks are underway with US Internet regarding potential Fiber to the Premises (FTTP) – homes, businesses, etc. – services beginning in 2016, and (2) staff is in the process of discussions with the City Attorney around more formal broadband readiness requirements related to new developments and significant remodeling efforts in St. Louis Park. It is expected that these will be explored in depth at the 2016 City Council workshop.

**NEXT STEPS:** First, Council approval would enable the City Manager to approve fiber and/or conduit lease agreements in an agile and responsive fashion as opportunities arise in the future. Second, staff will then work with at least one private party that has expressed on-going interest in entering into fiber lease agreements with the City. Third, staff plans to inform other potential lessees of the availability of dark fiber in the City. Finally, staff plans to return to Council with recommendations related to US Internet FTTP efforts and requiring broadband readiness in new and significantly remodeled buildings in the first quarter of 2016, another recommendation related to the 2012 fiber study.

## **DARK FIBER AGREEMENT INDEFEASIBLE RIGHT OF USE**

THIS LICENSE AGREEMENT (“Agreement”) is made as of the \_\_\_\_ day of \_\_\_\_\_, by and between the CITY OF ST. LOUIS PARK, a municipal corporation under the laws of the State of Minnesota, (“City”), whose address is 5005 Minnetonka Boulevard, St. Louis Park, MN 55416, and \_\_\_\_\_, a \_\_\_\_\_, having its principal address at \_\_\_\_\_ (“Licensee”).

### **RECITALS:**

WHEREAS, the City, Independent School District #283, and Local Government Information Systems have constructed a shared fiber optic network throughout portions of the City of St. Louis Park, the City portion of which is the subject of this agreement (“City Network”); and

WHEREAS, the City is willing, subject to the terms, covenants and conditions set forth in this Agreement, to grant to Licensee a license for the operation and use of certain City Dark Fiber in the City Network to Licensee, and Licensee desires to license, subject to the terms, covenants and conditions of this Agreement, the use of certain City Dark Fiber in the City Network.

**NOW THEREFORE**, in consideration of the foregoing, and of the promises and covenants contained in this Agreement, the parties agree as follows:

1. **Scope of Dark Fiber License.** The City hereby grants to Licensee on an exclusive basis the right to use the strand or strands of the City Dark Fiber described in Exhibit A, along the Route Segments described in Exhibit A, as the same may be amended from time to time according to the terms of this Agreement (the “Licensed Fibers”). This license agreement authorizes Licensee to use the Licensed Fibers in accordance with the terms of this Agreement.

2. **Effective Date and Term.** This short-term per strand/per mile/per month Agreement shall become effective as of the date that the City executes this Agreement (“Commencement Date”) and shall remain in effect unless and until terminated in accordance with the termination provisions of this Agreement. The term of this Agreement (“Term”) shall be for a period of [5 or more years] from and after the Commencement Date unless terminated earlier according to the terms of this Agreement.

The Licensed Fibers, identified in Exhibit A, may be changed from time to time in writing signed by the City and Licensee, as specified in the applicable amended Exhibit A, which shall be attached to this Agreement. The amended Exhibit A shall have its own term, which term shall commence on the date that the City executes the applicable amended Exhibit A and end on the Termination Date.

3. **Definitions.** For purposes of this Agreement, the terms set forth below shall be defined as follows:

**Acceptance Test** - The tests conducted on the Licensed Fibers by the Licensee to ensure that the Licensed Fibers meet or exceed the City Dark Fiber Specifications outlined in Exhibit B.

**City Conduit** - The City-owned conduit in which the City Dark Fiber is located.

**City Dark Fiber** - All Dark Fiber owned by the City whether dedicated for the City's use only or whether used by the City, Licensee or a third party.

**City Fiber Building** – The building(s) located within the City of St. Louis Park, MN in which the City Conduit is connected and the Fiber Equipment rack is located.

**Dark Fiber** - Unused Fiber through which no light is transmitted.

**Fiber Equipment Rack** – the equipment rack within the City Fiber Building on which the Licensee is allowed to mount their equipment and connect to the Licensed Fibers (if this agreement permits).

**Fiber Acceptance Date** - The date of the applicable Notice of Acceptance which evidences that the Licensed Fibers in the applicable Route Segments as defined in each Exhibit A have passed the Acceptance Test and have met the conditions of Section 6.

**License Fee** - The License Fee shall mean the Fiber License Fee as set forth in Section 4(a) of this Agreement.

**Licensed Fibers** - shall have the definition set forth in Section 1 of this Agreement.

**Licensee Equipment Location** - Locations where Licensee's Equipment will be installed within the City Fiber Building and Fiber Equipment Rack enclosures and Licensee's Equipment will be installed as outlined in Exhibit C (if this agreement permits). Fiber meet points (indoor and outdoor) are flexible, but also include clear demarcation and access points.

**Licensee's Equipment** - The Licensee's terminals and peripheral equipment or facilities used with or connected to the Licensed Fibers which may be located on City's property pursuant to a separate agreement or on Licensee's own land or that of a third party.

**Notice of Acceptance** - Licensee's written approval that the Licensed Fibers have passed the Acceptance Test. The Notice of Acceptance shall define the effective date for the Term of the Route Segment set forth in Exhibit A.

**Route Segment** - That portion of the City's Conduit containing the Licensed Fibers installed between the identified Splice Vaults as set forth in Exhibit A.

**Splice Vault** - The vaults installed by the City in the City Network where the City, the Licensee and other users of the City Network can splice into the City Conduit and/or the City Dark Fiber.

4. **Price and Payment.**

- (a) Licensee shall pay the City a one-time License Fee in the amount of \$\_\_\_\_\_ per route segment mile. The License Fee must be paid in full before the Licensed Fibers will be made available to Licensee for use.
- (b) Licensee shall pay the City an annual maintenance fee in the amount of \$\_\_\_\_\_ per route segment mile. A prorated annual maintenance fee shall be due on the Fiber Acceptance Date for the Route Segment, and thereafter the annual maintenance fee shall be due in full on January 1 of each calendar year in which the Agreement is active. Maintenance fees are subject to an increase of up to 3% per year over the term of the Agreement, at the City's discretion and based on costs.
- (c) Licensee shall pay the City for Licensee's share of federal or state taxes, if any, which may be imposed on the Licensed Fibers during the term of this Agreement.

- (d) All payments due from either party to the other under the terms of this Agreement which are not paid when due shall bear interest from the due date until paid at an interest rate equal to the lesser of 1-1/2% per month or the maximum lawful rate permitted by law.

5. **Acceptance Testing and Completion of Licensed Fibers.**

- (a) Upon Licensee's request, prior to the Licensee's splicing into the applicable City Dark Fiber, the City shall have the Licensed Fibers tested at the Licensee's sole cost and expense in accordance with the procedures and standards specified in Exhibit B ("Acceptance Testing"). City shall give Licensee five (5) business days prior notice of the time and location of the Acceptance Testing, and Licensee shall have the right, but not the obligation, to be present to observe the Acceptance Testing. City shall provide Licensee with a copy of such test results. City shall deliver the Licensed Fibers to Licensee in conformance with the fiber specifications set forth in Exhibit B.
- (b) Licensee shall be responsible for the timely completion of any work or installation required to place the Licensed Fibers into operation. Licensee's failure to complete such work shall not be grounds for rejection of a Completion Notice.
- (c) Upon the successful completion of Acceptance Testing, the City shall provide written notice to Licensee (a "Completion Notice"). City shall contemporaneously deliver a copy of the results of the Acceptance Testing and Licensee shall, within fifteen (15) days of receipt of the Completion Notice, either accept or reject the Completion Notice. Licensee shall be permitted to reject only if Licensee specifies the failure of the Licensed Fibers to satisfy the requirements of this Agreement by written notice to City. Licensee's written acceptance shall constitute the Notice of Acceptance. In the event Licensee rejects the Completion Notice, City shall promptly, and at no cost to Licensee, remedy the defect or failure specified in Licensee's notice. Thereafter City shall again conduct Acceptance Testing and, if successfully completed, provide Licensee a Completion Notice. The foregoing procedure shall apply again and successively thereafter until City has remedied all defects or failures specified by Licensee. Any failure by Licensee to timely reject a Completion Notice, or any use of the Licensed Fibers by Licensee for any purpose other than testing, shall be deemed to constitute acceptance for purposes of this Agreement and Licensee shall be deemed to have delivered a Notice of Acceptance upon the earlier of (i) such use or (ii) the fifteenth (15<sup>th</sup>) day after delivery of the Completion Notice.

6. **Use of Licensed Fibers; Access.** Licensee shall not use the Licensed Fibers in violation of this Agreement, any applicable law, rule, regulation or order of any governmental authority having jurisdiction, or any franchise, license, agreement or certificate related to the City Network, unless the validity thereof is being contested in good faith and by appropriate proceedings (but only so long as such proceedings and Licensee's use of the Licensed Fibers does not, in City's reasonable opinion, involve any risk of the forfeiture, or loss of the City Network or the City of any other license of the City Dark Fiber, or any part thereof or any interest therein).

7. **Performance and Maintenance.** City shall maintain the Licensed Fibers pursuant to Exhibit D, so that at all times the Licensed Fibers perform in accordance with the standards set forth in Exhibit B. Inspection and maintenance of the Licensed Fibers will be conducted by City or its subcontractors upon the request of Licensee unless prior arrangements have been made between City and Licensee. The Licensee shall be responsible for all cost of the City relating to the inspection and maintenance of the Licensed Fibers requested by the Licensee and the Licensee shall pay the City for said cost within thirty (30) days of the City invoicing the Licensee.

8. **Ownership and Title.** All ownership, rights, title and interest in all the Licensed Fibers shall at all times remain exclusively with the City. All right, title and interest in the Licensee's Equipment shall at all times remain exclusively that of the Licensee.

9. **Liens and Encumbrances.** Neither party, directly or indirectly, shall create or impose any lien on the property of the other or on the rights or title relating thereto or any interest therein or in this Agreement.

10. **Representations and Covenants Regarding Authorizations.**

(a) Licensee hereby represents, warrants and covenants to City as follows:

- (i) Licensee is duly organized, validly existing and in good standing under the laws of the State of Minnesota and has full power and authority to execute, deliver and perform the terms of this Agreement.
- (ii) Licensee has or will use its best commercial efforts to obtain and maintain all rights, licenses, governmental regulatory approvals, authorizations, rights-of-way, and other agreements and permissions necessary for the use of the Licensed Fibers, or Licensee's Equipment, as well as any other such rights, licenses, authorizations, rights-of-way, and other agreements, easements, or permissions necessary for the installation and use of the Licensed Fibers. Licensee shall be solely liable for all costs related thereto.
- (iii) Licensee covenants that its use of the Licensed Fibers shall at all times be in compliance with law and that Licensee has received and is in compliance with all regulatory authorizations.
- (iv) Licensee shall be responsible for and shall pay all taxes or fees, including, but not limited to, franchise fees imposed by any other governmental agency or authority as a result of Licensee's operation or use of the Licensed Fibers pursuant to this Agreement. The City represents and warrants that with respect to any Licensed Fibers pursuant to this Agreement the City has obtained any and all necessary rights of way or other authorizations by whatever name, such that the City is legally permitted to own, use and license the Licensed Fibers; the City shall grant Licensee whatever permission is necessary such that the Licensee may benefit from such authorizations. With respect to any additional authorization required of Licensee to install or operate the Licensed Fibers, Licensee shall, at its own expense, obtain all municipal street rights and/or property leases that may be required for the construction or operation of the Licensed Fibers thereof by Licensee.

(b) City hereby represents, warrants and covenants to Licensee as follows:

- (i) City is duly organized and validly existing under the laws of its State of Minnesota and has full power and authority to execute, deliver and perform the terms of this Agreement.
- (ii) City has obtained and will maintain all rights, licenses, governmental regulatory approvals, authorizations, rights-of-way, and other agreements and permissions necessary for the use of the Licensed Fibers, and the City Network including such rights, licenses, authorizations, rights-of-way, and other agreements, easements, or permissions necessary for the installation of the City Network and use of the Licensed Fibers. City shall be solely liable for all costs related thereto.

11. **Compliance with Law.** Each party shall perform its respective rights and obligations hereunder in accordance with all applicable laws, rules and regulations imposed by any governmental authority.

12. **Access to the City Fiber Building and the Licensed Fibers.** The City shall provide Licensee with reasonable access (as determined solely by the City) to the City Fiber Building and the Licensed

Fibers shown on Exhibit A as described within Section 25 upon the execution of this Agreement by the City and the Licensee.

13. **Relocation of the Licensed Fiber.** Licensee recognizes that, from time to time, City may elect or be required to relocate the Licensed Fibers and/or City Conduit, whether such relocation is for the convenience of City or is a requirement by law or existing contract or by loss of right-of-way. In these instances, the City shall be solely responsible for all costs incurred to relocate the Licensed Fibers except for the cost related to the Licensee splicing into the new Licensed Fiber. For any other relocation, Licensee shall pay its proportional share of the cost, defined as the number of Licensed Fibers divided by the total number of City Dark Fiber and Licensee Dark Fiber in any given Route Segment. City will use commercially reasonable efforts to effect any relocation in a manner that will not cause any material interruption to Licensee's use of the Licensed Fibers.

14. **Condemnation and Casualty.**

- (a) Condemnation. If all or any portion of the Licensed Fibers are taken for any public or quasi-public purpose by any lawful power or authority by the exercise of the right of condemnation or eminent domain, the City and the Licensee shall be entitled to terminate this Agreement with respect to the Licensed Fibers affected, or if such condemnation materially affects the intended purpose of the Licensed Fibers, then Licensee may terminate the Agreement in its entirety. In such event, both parties shall be entitled to participate in any condemnation proceedings to seek to obtain compensation by separate awards for the economic value of their respective interests in the City Dark Fiber or the Licensed Fibers.
- (b) Casualty. If all or any portion of the City Dark Fiber, the City Conduit or the Licensed Fibers are made inoperable and beyond feasible repair due to a casualty or other Force Majeure Event (as that term is defined in Section 24 below), Licensee shall be entitled to terminate this Agreement with respect to the applicable Licensed Fibers affected by such casualty or other event. In such event, both parties shall be entitled to seek to recover the economic value of their respective interests in the City Dark Fiber, the City Conduit or the Licensed Fibers (i) under any insurance policy carried by either party or any third party, or (ii) in either joint or separate actions, from any third party that may be legally responsible for causing such casualty.

15. **Government Data Practices.** The parties must comply with the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13, as it applies to all data provided by each party under this Agreement, and as it applies to all data created, collected, received, stored, used, maintained, or disseminated by any 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 any party.

If Licensee receives a request to release data, Licensee must immediately notify the City. The City will give the Licensee instructions concerning the release of the data to the requesting party before the data is released. Licensee must comply with City's instructions related to data requests under this section.

16. **Liability and Insurance.**

- (a) **Indemnification by Licensee.** Licensee agrees to defend, indemnify and hold harmless the City and its elected officials, officers, employees, agents, contractors and representatives, from and against any and all claims, costs, losses, expenses, demands, actions, or causes of action, including reasonable attorneys' fees and other costs and expenses of litigation (collectively "Damages"), that may be asserted against or incurred by the City or for which the City may be liable in the performance of this Agreement, whether arising from the negligence intentional acts of the City, its respective employees, agents or contractors, Licensee, or a third party. Licensee shall further defend and indemnify all claims arising out of the installation, operation, use, maintenance, repair, or removal of the Licensed Fibers as may be required by this Agreement.

- (b) Licensee shall obtain and maintain during the term of this Agreement, General Liability Insurance with single-occurrence liability limits of One Million Five Hundred Thousand Dollars (\$1,500,000.00), naming the Town as an additional insured.
- (c) Notwithstanding anything to the contrary in this Agreement, in no event will City be liable to Licensee for punitive, indirect, incidental, special or consequential damages, including, without limitation, loss of profits, income or business opportunities.

17. **Events of Default.** Each of the following events shall constitute an event of default (whether any such event shall be voluntary or involuntary or occur by operation of law or pursuant to any judgment, decree, order, rule or regulation of any court or administrative or governmental body):

- (a) The failure of Licensee to pay any License Fee when due or any other payment due hereunder and the continuation of such failure for thirty (30) days after written notice is given by City demanding such payment;
- (b) If either party fails to observe or performs its obligations under this Agreement and does not cure such failure within thirty (30) days from its receipt of written notice of breach without, however, limiting any other rights available to the parties pursuant to any other provision of this Agreement. If the default may not be reasonably cured within such thirty (30) day period, either party may request the other party to grant an extension of the time to cure not to exceed ninety (90) days, consent to such extension not to be unreasonably withheld.
- (c) The failure of Licensee to carry and maintain insurance in compliance with all provisions of this Agreement.
- (d) The Licensee shall cease to have any of the licenses, agreement, certificates, concessions, permits, rights or privileges required for the conduct of its business and operations which loss is not remedied by the obtaining of a replacement license, agreement, certificate, concession, permit, right or privilege within sixty (60) days of the loss thereof, if such loss would have a material adverse effect upon the ability of the Licensee to perform its obligations or enjoy its rights hereunder.
- (e) Licensee shall admit in writing an inability to pay its debts as such debts become due or Licensee shall (1) apply for or consent to the appointment of, or the taking of possession by, a receiver, administrator, custodian, trustee or liquidator of itself or of all or a substantial part of its property or assets, (2) make a general assignment for the benefit of its creditors, (3) commence a voluntary case under the U.S. Bankruptcy Code, (4) file a petition or otherwise commence a proceeding under any bankruptcy, insolvency reorganization winding-up, or composition or readjustment of debts or similar law, (5) fail to controvert in a timely and appropriate manner, or acquiesce in writing to, any petition filed against it in an involuntary case under the U.S. Bankruptcy Code, or (6) take any action for the purpose of effecting any of the foregoing; or a proceeding or case shall be commenced, without the application or consent of Licensee, in any court of competent jurisdiction, seeking (1) its liquidation, reorganization, dissolution or winding-up, or the composition or readjustment of its debts, (2) the appointment of a trustee, receiver, administrator, custodian, liquidator or the like of Licensee or of all or any substantial part of its assets, or (3) similar relief in respect of any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts, which proceeding is not dismissed within ninety (90) days thereafter.

18. **Rights Upon Default.**

- (a) Upon the occurrence of a default by Licensee, the City may forthwith terminate this Agreement or any particular Route Segment by thirty (30) days written notice to Licensee. The right of the City to terminate a specific Route Segment or this Agreement shall be in addition to, and not in substitution for, any other rights that the City may have at law or equity as a result of a default by Licensee.
- (b) Upon the occurrence of a default by the City, Licensee shall be entitled to terminate this Agreement or any particular Route Segment by thirty (30) days written notice to the City. Unless otherwise explicitly set forth in this Agreement, this shall constitute Licensee's sole remedy for the City's default.

19. **Remedies.** Upon the occurrence and during the continuance of any event of default, the non-defaulting party may, at its option, declare this Agreement to be in default and may, in addition to any other remedies provided herein, terminate this Agreement. No remedy is intended to be exclusive, but each shall be cumulative and in addition to and may be exercised concurrently with any other remedy available to City or Licensee at law or in equity.

20. **Termination.**

- (a) **Licensee's Liability for Early Termination.** If Licensee terminates this Agreement as to all or any Licensed Fibers for any reason, the Licensee shall pay to the City as liquidated damages for early termination, one hundred fifty percent (150%) of the applicable annual Maintenance Fees for the applicable Licensed Fibers for the year in which Licensee terminates ("Termination Fee"). All Maintenance Fees previously paid to the City shall be retained by the City.
- (b) **Removal of Licensee's Equipment.** Upon termination of this Agreement for any reason, Licensee shall remove all of Licensee's Equipment within ninety (90) days of the notice provided pursuant to Section 20 of this Agreement or within 90 days of the end of the Term, whichever occurs first. In the event Licensee does not remove said Equipment within the applicable timeframe, Licensee hereby authorizes the City to immediately remove and dispose of all Equipment, and the City shall not be liable to Licensee for any costs or reimbursements associated with the Equipment.

21. **Force Majeure Events.** Neither party shall be liable to the other for any failure of performance under this Agreement due to causes beyond its control, including but not limited to: acts of God, fire, flood or other catastrophes; any law, order, regulation, direction, action or request of the United States Government, or of any other government, including state and local governments having or claiming jurisdiction over such party, or of any department, agency, commission, bureau, corporation or other instrumentality of any one or more of these federal, state or local governments, or of any civil or military authority; national emergencies; insurrections; riots; wars; permitting authorities, pole or right-of-way owners; or strikes, lock outs, work stoppages or other labor difficulties (collectively, "**FORCE MAJEURE EVENTS**").

22. **Rights and Obligations of Licensee.** In addition to the rights and obligations of Licensee set forth elsewhere in this Agreement, Licensee shall:

- (a) have full and complete control, responsibility and liability for the signals distributed over the fiber optic components of the Licensed Fibers licensed by Licensee or for its benefit;
- (b) have full and complete control, responsibility and liability for the purchase, installation, construction and maintenance of the Licensee's Equipment;

- (c) have full and complete control, responsibility and liability for obtaining and maintaining any operating authority from any federal, state or local governmental body or agency that relates to the activities of Licensee under this Agreement, including Licensee's license of channel capacity on the Licensed Fibers.

23. **Access and Security.**

- (a) The City agrees to allow Licensee direct ingress and egress to the City's property at such times as may be required for Licensee to perform any appropriate testing, maintenance and repair on Licensee's Equipment. The City may require that a representative of the City accompany any representatives of Licensee on such visits to the City property. Employees and agents of Licensee or of a Licensee designee shall, while on the property of the City, comply with all rules and regulations including, without limitation, security/safety requirements and, where required by government regulations, receipt of satisfactory governmental clearances. The City shall have the right to notify Licensee that certain Licensee or Licensee designated employees are excluded if, in the reasonable judgment of the City, the exclusion of such employees is necessary for the proper security and maintenance of the City's facilities.
- (b) Notwithstanding the provisions of this Section, each party acknowledges that the operational efficiency of the other depends on the continuous availability of its trained personnel and, accordingly, both parties will act cooperatively to resolve any situations which may arise that threaten the security, operations or maintenance of either party's facilities prior to excluding any personnel.

24. **Assignment.** Licensee may not assign, transfer, delegate or in any other manner dispose of, any of its rights, privileges or obligations under this Agreement without the express written consent of City.

25. **Forum for Litigation.** In the event that litigation is required in order to resolve any dispute or disagreement connected with this Agreement, it is agreed by and between the parties hereto that venue and jurisdiction for any such litigation shall be in Hennepin County, Minnesota. Unless otherwise provided by law, any and all litigation between the parties hereto arising out of this Agreement shall be instituted and maintained in a court of competent jurisdiction in Hennepin County, Minnesota. Any cause of action arising by virtue of the laws of the United States shall be instituted in a court of competent jurisdiction in the State of Minnesota.

26. **Miscellaneous.**

- (a) **Counterparts.** This Agreement may be executed in counterparts each of which shall be deemed an original and all of which together shall constitute one and the same instrument, and in pleading or proving any provision of this Agreement, it shall not be necessary to produce more than one complete set of such counterparts.
- (b) **Captions; Gender.** Article and section headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement. Whenever used herein the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall include all genders.
- (c) **Governing Law and Binding Effect.** This Agreement shall be construed and enforced in accordance with, and the validity and performance hereof shall be governed by the laws of the State of Minnesota. This Agreement shall bind and inure to the benefit of each of the parties and their successors and permitted assigns.

- (d) Waivers and Amendments. This Agreement may not be amended nor shall any waiver, change, modification, consent or discharge be effected, except by an instrument in writing adopted, in the case of an amendment, by each party and, in the case of a waiver, consent or discharge, by the party against whom enforcement of such instrument is sought. Any consent by either party to, or waiver of, a breach by the other party shall not constitute a waiver or consent to any subsequent or different breach. If either party shall fail to enforce a breach of this Agreement by the other party, such failure to enforce shall not be considered a consent to or a waiver of said breach or any subsequent breach for any purpose whatsoever.
- (e) Relationship Not a Partnership or an Agency. The relationship between Licensee and City shall not be that of partners or agents for one another and nothing contained in this Agreement shall be deemed to constitute a partnership, joint venture or agency agreement between them.
- (f) Notices. All notices, requests, demands, statements, reports and other communications under this Agreement shall be in writing and deemed to be duly delivered, if delivered in person, by overnight courier or by certified or registered mail:

If to City:                      City of St. Louis Park  
   5005 Minnetonka Boulevard  
   St. Louis Park, MN 55416  
   Attn: \_\_\_\_\_,  
   Chief Information Officer

With a copy to:                St. Louis Park City Attorney  
   Campbell Knutson, PA  
   Grand Oak Office Center I  
   860 Blue Gentian Road, Suite 290  
   Eagan, MN 55121

If to Licensee:                \_\_\_\_\_  
   \_\_\_\_\_  
   \_\_\_\_\_

With a copy to:                \_\_\_\_\_  
   \_\_\_\_\_  
   \_\_\_\_\_  
   Their Attorney

Either party hereto may change its mailing address by giving notice to the other pursuant to the provisions of this paragraph.

- (g) Disclaimers. There are no agreements, warranties or representations, express or implied either in fact or by operation of law, statutory or otherwise, including warranties of merchantability and fitness for a particular purpose or use, except those expressly set forth herein.
- (h) Entire Agreement. This Agreement, including the exhibits, schedules and annexes hereto, which are hereby incorporated by reference and made a part of this Agreement as if they were fully set forth herein, constitutes the entire agreement between City and Licensee with respect to the subject matter hereof and supersedes all prior agreements and understandings between them as to such subject matter, and there are no restrictions, agreements, arrangements or undertaking, oral or written, between City and Licensee relating to the transactions contemplated hereby which are not fully expressed or referred to herein.



**LICENSEE:**

Dated: \_\_\_\_\_

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF MINNESOTA        )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_,  
by \_\_\_\_\_, the \_\_\_\_\_, of \_\_\_\_\_, a  
\_\_\_\_\_, on behalf of \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

THIS INSTRUMENT WAS DRAFTED BY:  
CITY OF ST. LOUIS PARK  
5005 Minnetonka Boulevard  
St. Louis Park, MN 55416  
Telephone: (952) 924-2500

**EXHIBIT A**

Designation of Licensed Route Segments, Splice Vaults, and Licensed Fiber Stands

## EXHIBIT B

### City Network Fiber Acceptance Testing Procedures and Standards

The intent of this Exhibit is to identify the fiber acceptances testing procedures and standards used within the City Network. Deviations from these specifications may occur if City acquires a portion of the City Network from a third party pursuant to the Agreement.

1. All splices shall be fusion spliced. Mechanical splices are only allowed during temporary restoration and will be replaced within three (3) business days, with fusion splices.
2. Fibers shall be terminated with \_\_\_\_\_ connectors (typical return loss of 0.50 dB).
3. After end-to-end connectivity on the fibers has been completed, bi-directional OTDR span and power meter testing will be completed. City shall perform tests after the fiber cable is installed and the splicing enclosures have been completed and are in their final resting configuration with the cable vault or hand hole covers closed. This ensures that no micro or macro bending problems with the cable or fiber strands will contribute to the loss/attenuation measurements.
4. Power meter tests shall be completed to verify and insure that no fibers have been crossed at any of the splice points within the network. City shall test and record power level readings on all fiber strands in both directions of transmission (bi-directionally) using the 1310 & 1550 nm wavelengths.
5. All OTDR and power meter tests shall be completed as follows:
  - a. All OTDR traces shall be taken from both ends of a section (between adjacent Locations) and recorded using the 1310 & 1550 nm wavelength. Loss/attenuation measurements for each splice point from both directions shall be taken and recorded.
  - b. The end-to-end loss value as measured with an industry-accepted laser source and power meter should have an attenuation rating of less than or equal to the following:
    - (1) At 1310 nm:  $(0.35 \text{ dB/km} \times \text{km of cable}) + (\text{number of connectors} \times 0.50) + (0.05 \times \text{number of splices})$ .
    - (2) At 1550 nm:  $(0.25 \text{ dB/km} \times \text{km of cable}) + (\text{number of connectors} \times 0.50) + (0.05 \times \text{number of splices})$ .
  - c. City's loss/attenuation objective for each fiber optic splice is 0.05 dB when measured in one direction with an OTDR test set (excluding connector loss, which is typically 0.50 dB per mated connector pair). If after three attempts this parameter is not met, the splice will be marked as Out-Of-Spec (OOS) and the splice will remain provided the average loss/attenuation value of all splices on an individual fiber basis shall not exceed 0.10 dB for the entire ring or subsystem.
  - d. For bi-directional OTDR testing, the distance from Location "A" and Location "Z" shall be recorded for each splice point. The loss/attenuation at each splice point shall be recorded at both wavelengths (1310 nm & 1550 nm) in each direction. City shall then average the two readings to obtain the final average splice loss/attenuation for each splice point of each fiber strand within the fiber optic cable.
  - e. Each fiber strand color must be recorded along with its buffer tube color or the ribbon color. The laser source transmit power level using the 1310 & 1550 nm wavelengths will always be recorded together with the receive power level reading at the receiving end of the test.
6. OTDR traces will be taken and splice loss measurements recorded. City will store OTDR traces on electronic media. Loss measurements will be recorded using an industry accepted laser source and a power meter. Copies of all data sheets and tables and one set of diskettes with all traces will be available to Licensee.
7. Following emergency restoral, City personnel shall perform span test documenting end to end attenuation measurement of each fiber and will be completed in both directions at 1310 & 1550 nm wavelengths. Upon permanent repair, new splice loss readings should be approximately the original splice loss specifications.

**EXHIBIT C**

City Fiber Building and Location on the Fiber Equipment Rack (if applicable)

## **EXHIBIT D**

### Maintenance Specifications

1. Notice. City shall provide Licensee with telephone, facsimile, or written notice of all non-emergency planned network maintenance no later than seven (7) business days prior to performing maintenance that, in its reasonable opinion, has a substantial likelihood of affecting Licensee's traffic. If City's planned activity is canceled or delayed, City shall promptly notify Licensee and shall comply with the provisions of the previous sentence to reschedule any delayed activity.
2. Standard of Care; Cooperation. In performing its services hereunder, City shall take workmanlike care and make commercially reasonable efforts to prevent impairment to the signal continuity and performance of the Licensed Fibers. In addition, City shall reasonably cooperate with Licensee in sharing information and analyzing the disturbances regarding the cable and/or fiber facilities.
3. Licensee's Equipment. Nothing contained herein shall make City responsible for the Licensee's Equipment.
4. Escalation List. City shall, at Licensee's request, provide Licensee an operations escalation list for use in reporting and seeking redress of exceptions noted in City's performance of routine maintenance and non-routine maintenance

5.

**DARK FIBER AGREEMENT  
SHORT TERM LICENSE**

THIS LICENSE AGREEMENT (“Agreement”) is made as of the \_\_\_\_ day of \_\_\_\_\_, by and between the CITY OF ST. LOUIS PARK, a municipal corporation under the laws of the State of Minnesota, (“City”), whose address is 5005 Minnetonka Boulevard, St. Louis Park, MN 55416, and \_\_\_\_\_, a \_\_\_\_\_, having its principal address at \_\_\_\_\_ (“Licensee”).

RECITALS:

WHEREAS, the City, Independent School District #283, and Local Government Information Systems have constructed a shared fiber optic network throughout portions of the City of St. Louis Park, the City portion of which is the subject of this agreement (“City Network”); and

WHEREAS, the City is willing, subject to the terms, covenants and conditions set forth in this Agreement, to grant to Licensee a license for the operation and use of certain City Dark Fiber in the City Network to Licensee, and Licensee desires to license, subject to the terms, covenants and conditions of this Agreement, the use of certain City Dark Fiber in the City Network.

**NOW THEREFORE**, in consideration of the foregoing, and of the promises and covenants contained in this Agreement, the parties agree as follows:

1. **Scope of Dark Fiber License.** The City hereby grants to Licensee on an exclusive basis the right to use the strand or strands of the City Dark Fiber described in Exhibit A, along the Route Segments described in Exhibit A, as the same may be amended from time to time according to the terms of this Agreement (the “Licensed Fibers”). This license agreement authorizes Licensee to use the Licensed Fibers in accordance with the terms of this Agreement.

2. **Effective Date and Term.** This short-term per strand/per mile/per month Agreement shall become effective as of the date that the City executes this Agreement (“Commencement Date”) and shall remain in effect unless and until terminated in accordance with the termination provisions of this Agreement. The term of this Agreement (“Term”) shall be for a period of \_\_\_\_ [2-5 years] \_\_\_\_ from and after the Commencement Date unless terminated earlier according to the terms of this Agreement.

The Licensed Fibers, identified in Exhibit A, may be changed from time to time in writing signed by the City and Licensee, as specified in the applicable amended Exhibit A, which shall be attached to this Agreement. The amended Exhibit A shall have its own term, which term shall commence on the date that the City executes the applicable amended Exhibit A and end on the Termination Date.

3. **Definitions.** For purposes of this Agreement, the terms set forth below shall be defined as follows:

**Acceptance Test** - The tests conducted on the Licensed Fibers by the Licensee to ensure that the Licensed Fibers meet or exceed the City Dark Fiber Specifications outlined in Exhibit B.

**City Conduit** - The City-owned conduit in which the City Dark Fiber is located.

**City Dark Fiber** - All Dark Fiber owned by the City whether dedicated for the City's use only or whether used by the City, Licensee or a third party.

**City Fiber Building** – The building(s) located within the City of St. Louis Park, MN in which the City Conduit is connected and the Fiber Equipment rack is located.

**Dark Fiber** - Unused Fiber through which no light is transmitted.

**Fiber Equipment Rack** – the equipment rack within the City Fiber Building on which the Licensee is allowed to mount their equipment and connect to the Licensed Fibers (if this agreement permits).

**Fiber Acceptance Date** - The date of the applicable Notice of Acceptance which evidences that the Licensed Fibers in the applicable Route Segments as defined in each Exhibit A have passed the Acceptance Test and have met the conditions of Section 6.

**License Fee** - The License Fee shall mean the Fiber License Fee as set forth in Section 4(a) of this Agreement.

**Licensed Fibers** - shall have the definition set forth in Section 1 of this Agreement.

**Licensee Equipment Location** - Locations where Licensee's Equipment will be installed within the City Fiber Building and Fiber Equipment Rack enclosures and Licensee's Equipment will be installed as outlined in Exhibit C (if this agreement permits). Fiber meet points (indoor and outdoor) are flexible, but also include clear demarcation and access points.

**Licensee's Equipment** - The Licensee's terminals and peripheral equipment or facilities used with or connected to the Licensed Fibers which may be located on City's property pursuant to a separate agreement or on Licensee's own land or that of a third party.

**Notice of Acceptance** - Licensee's written approval that the Licensed Fibers have passed the Acceptance Test. The Notice of Acceptance shall define the effective date for the Term of the Route Segment set forth in Exhibit A.

**Route Segment** - That portion of the City's Conduit containing the Licensed Fibers installed between the identified Splice Vaults as set forth in Exhibit A.

**Splice Vault** - The vaults installed by the City in the City Network where the City, the Licensee and other users of the City Network can splice into the City Conduit and/or the City Dark Fiber.

4. **Price and Payment.**

- (a) Licensee shall pay the City a short-term license fee for the use of the Licensed Fibers provided by the City ("License Fee") which License Fee shall commence on the Fiber Acceptance Date. The License Fee payable to the City for the Licensed Fibers shall be \$ \_\_\_\_\_ per strand per mile per month. The License Fee shall be payable quarterly, in advance, on the first day of each calendar quarter commencing on the Fiber Acceptance Date for the Route Segment. Should the Fiber Acceptance Date be any date other than the first day of any calendar quarter, then that initial quarter's License Fee and the final quarter's License Fees shall be prorated based on the actual date.
- (b) Licensee shall pay the City for Licensee's share of federal or state taxes, if any, which may be imposed on the Licensed Fibers during the term of this Agreement.
- (c) Licensee shall pay all License Fees, by check in the amount set forth on the statement sent to the Licensee by the City. The Licensee shall pay to the City a late payment fee of five percent (5%) of the amount of any License Fee payment that is overdue by more than ten (10) days ("Late Payment Fee").
- (d) All payments due from either party to the other under the terms of this Agreement which are not paid when due shall bear interest from the due date until paid at an interest rate equal to the lesser of 1-1/2% per month or the maximum lawful rate permitted by law.

5. **Acceptance Testing and Completion of Licensed Fibers.**

- (a) Upon Licensee's request, prior to the Licensee's splicing into the applicable City Dark Fiber, the City shall have the Licensed Fibers tested at the Licensee's sole cost and expense in accordance with the procedures and standards specified in Exhibit B ("Acceptance Testing"). City shall give Licensee five (5) business days prior notice of the time and location of the Acceptance Testing, and Licensee shall have the right, but not the obligation, to be present to observe the Acceptance Testing. City shall provide Licensee with a copy of such test results. City shall deliver the Licensed Fibers to Licensee in conformance with the fiber specifications set forth in Exhibit B.
- (b) Licensee shall be responsible for the timely completion of any work or installation required to place the Licensed Fibers into operation. Licensee's failure to complete such work shall not be grounds for rejection of a Completion Notice.
- (c) Upon the successful completion of Acceptance Testing, the City shall provide written notice to Licensee (a "Completion Notice"). City shall contemporaneously deliver a copy of the results of the Acceptance Testing and Licensee shall, within fifteen (15) days of receipt of the Completion Notice, either accept or reject the Completion Notice. Licensee shall be permitted to reject only if Licensee specifies the failure of the Licensed Fibers to satisfy the requirements of this Agreement by written notice to City. Licensee's written acceptance shall constitute the Notice of Acceptance. In the event Licensee rejects the Completion Notice, City shall promptly, and at no cost to Licensee, remedy the defect or failure specified in Licensee's notice. Thereafter City shall again conduct Acceptance Testing and, if successfully completed, provide Licensee a Completion Notice. The foregoing procedure shall apply again and successively thereafter until City has remedied all defects or failures specified by Licensee. Any failure by Licensee to timely reject a Completion Notice, or any use of the Licensed Fibers by Licensee for any purpose other than testing, shall be deemed to constitute acceptance for purposes of this Agreement and Licensee shall be deemed to have delivered a Notice of Acceptance upon the earlier of (i) such use or (ii) the fifteenth (15<sup>th</sup>) day after delivery of the Completion Notice.

6. **Use of Licensed Fibers; Access.** Licensee shall not use the Licensed Fibers in violation of this Agreement, any applicable law, rule, regulation or order of any governmental authority having jurisdiction, or any franchise, license, agreement or certificate related to the City Network, unless the validity thereof is being contested in good faith and by appropriate proceedings (but only so long as such proceedings and Licensee's use of the Licensed Fibers does not, in City's reasonable opinion, involve any risk of the forfeiture, or loss of the City Network or the City of any other license of the City Dark Fiber, or any part thereof or any interest therein).

7. **Performance and Maintenance.** City shall maintain the Licensed Fibers pursuant to Exhibit D, so that at all times the Licensed Fibers perform in accordance with the standards set forth in Exhibit B. Inspection and maintenance of the Licensed Fibers will be conducted by City or its subcontractors upon the request of Licensee unless prior arrangements have been made between City and Licensee. The Licensee shall be responsible for all cost of the City relating to the inspection and maintenance of the Licensed Fibers requested by the Licensee and the Licensee shall pay the City for said cost within thirty (30) days of the City invoicing the Licensee.

8. **Ownership and Title.** All ownership, rights, title and interest in all the Licensed Fibers shall at all times remain exclusively with the City. All right, title and interest in the Licensee's Equipment shall at all times remain exclusively that of the Licensee.

9. **Liens and Encumbrances.** Neither party, directly or indirectly, shall create or impose any lien on the property of the other or on the rights or title relating thereto or any interest therein or in this Agreement.

10. **Representations and Covenants Regarding Authorizations.**

(a) Licensee hereby represents, warrants and covenants to City as follows:

- a. Licensee is duly organized, validly existing and in good standing under the laws of the State of Minnesota and has full power and authority to execute, deliver and perform the terms of this Agreement.
- b. Licensee has or will use its best commercial efforts to obtain and maintain all rights, licenses, governmental regulatory approvals, authorizations, rights-of-way, and other agreements and permissions necessary for the use of the Licensed Fibers, or Licensee's Equipment, as well as any other such rights, licenses, authorizations, rights-of-way, and other agreements, easements, or permissions necessary for the installation and use of the Licensed Fibers. Licensee shall be solely liable for all costs related thereto.
- c. Licensee covenants that its use of the Licensed Fibers shall at all times be in compliance with law and that Licensee has received and is in compliance with all regulatory authorizations.
- d. Licensee shall be responsible for and shall pay all taxes or fees, including, but not limited to, franchise fees imposed by any other governmental agency or authority as a result of Licensee's operation or use of the Licensed Fibers pursuant to this Agreement. The City represents and warrants that with respect to any Licensed Fibers pursuant to this Agreement the City has obtained any and all necessary rights of way or other authorizations by whatever name, such that the City is legally permitted to own, use and license the Licensed Fibers; the City shall grant Licensee whatever permission is necessary such that the Licensee may benefit from such authorizations. With respect to any additional authorization required of Licensee to install or operate the Licensed Fibers, Licensee shall, at its own expense, obtain all municipal street rights and/or property leases that may be required for the construction or operation of the Licensed Fibers thereof by Licensee.

(b) City hereby represents, warrants and covenants to Licensee as follows:

- a. City is duly organized and validly existing under the laws of its State of Minnesota and has full power and authority to execute, deliver and perform the terms of this Agreement.
  - (i) City has obtained and will maintain all rights, licenses, governmental regulatory approvals, authorizations, rights-of-way, and other agreements and permissions necessary for the use of the Licensed Fibers, and the City Network including such rights, licenses, authorizations, rights-of-way, and other agreements, easements, or permissions necessary for the installation of the City Network and use of the Licensed Fibers. City shall be solely liable for all costs related thereto.

11. **Compliance with Law.** Each party shall perform its respective rights and obligations hereunder in accordance with all applicable laws, rules and regulations imposed by any governmental authority.

12. **Access to the City Fiber Building and the Licensed Fibers.** The City shall provide Licensee with reasonable access (as determined solely by the City) to the City Fiber Building and the Licensed Fibers shown on Exhibit A as described within Section 25 upon the execution of this Agreement by the City and the Licensee.

13. **Relocation of the Licensed Fiber.** Licensee recognizes that, from time to time, City may elect or be required to relocate the Licensed Fibers and/or City Conduit, whether such relocation is for the convenience of City or is a requirement by law or existing contract or by loss of right-of-way. In these instances, the City shall be solely responsible for all costs incurred to relocate the Licensed Fibers except for the cost related to the Licensee splicing into the new Licensed Fiber. For any other relocation, Licensee shall pay its proportional share of the cost, defined as the number of Licensed Fibers divided by the total number of City Dark Fiber and Licensee Dark Fiber in any given Route Segment. City will use commercially reasonable efforts to effect any relocation in a manner that will not cause any material interruption to Licensee's use of the Licensed Fibers.

14. **Condemnation and Casualty.**

- (a) **Condemnation.** If all or any portion of the Licensed Fibers are taken for any public or quasi-public purpose by any lawful power or authority by the exercise of the right of condemnation or eminent domain, the City and the Licensee shall be entitled to terminate this Agreement with respect to the Licensed Fibers affected, or if such condemnation materially affects the intended purpose of the Licensed Fibers, then Licensee may terminate the Agreement in its entirety. In such event, both parties shall be entitled to participate in any condemnation proceedings to seek to obtain compensation by separate awards for the economic value of their respective interests in the City Dark Fiber or the Licensed Fibers.
- (b) **Casualty.** If all or any portion of the City Dark Fiber, the City Conduit or the Licensed Fibers are made inoperable and beyond feasible repair due to a casualty or other Force Majeure Event (as that term is defined in Section 24 below), Licensee shall be entitled to terminate this Agreement with respect to the applicable Licensed Fibers affected by such casualty or other event. In such event, both parties shall be entitled to seek to recover the economic value of their respective interests in the City Dark Fiber, the City Conduit or the Licensed Fibers (i) under any insurance policy carried by either party or any third party, or (ii) in either joint or separate actions, from any third party that may be legally responsible for causing such casualty.

15. **Government Data Practices.** The parties must comply with the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13, as it applies to all data provided by each party under this Agreement, and as it applies to all data created, collected, received, stored, used, maintained, or disseminated by any 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 any party.

If Licensee receives a request to release data, Licensee must immediately notify the City. The City will give the Licensee instructions concerning the release of the data to the requesting party before the data is released. Licensee must comply with City's instructions related to data requests under this section.

16. **Liability and Insurance.**

- (a) **Indemnification by Licensee.** Licensee agrees to defend, indemnify and hold harmless the City and its elected officials, officers, employees, agents, contractors and representatives, from and against any and all claims, costs, losses, expenses, demands, actions, or causes of action, including reasonable attorneys' fees and other costs and expenses of litigation (collectively "Damages"), that may be asserted against or incurred by the City or for which the City may be liable in the performance of this Agreement, whether arising from the negligence intentional acts of the City, its respective employees, agents or contractors, Licensee, or a third party. Licensee shall further defend and indemnify all claims arising out of the installation, operation, use, maintenance, repair, or removal of the Licensed Fibers as may be required by this Agreement.

- (b) Licensee shall obtain and maintain during the term of this Agreement, General Liability Insurance with single-occurrence liability limits of One Million Five Hundred Thousand Dollars (\$1,500,000.00), naming the Town as an additional insured.
- (c) Notwithstanding anything to the contrary in this Agreement, in no event will City be liable to Licensee for punitive, indirect, incidental, special or consequential damages, including, without limitation, loss of profits, income or business opportunities.

17. **Events of Default.** Each of the following events shall constitute an event of default (whether any such event shall be voluntary or involuntary or occur by operation of law or pursuant to any judgment, decree, order, rule or regulation of any court or administrative or governmental body):

- (a) The failure of Licensee to pay any License Fee when due or any other payment due hereunder and the continuation of such failure for thirty (30) days after written notice is given by City demanding such payment;
- (b) If either party fails to observe or performs its obligations under this Agreement and does not cure such failure within thirty (30) days from its receipt of written notice of breach without, however, limiting any other rights available to the parties pursuant to any other provision of this Agreement. If the default may not be reasonably cured within such thirty (30) day period, either party may request the other party to grant an extension of the time to cure not to exceed ninety (90) days, consent to such extension not to be unreasonably withheld.
- (c) The failure of Licensee to carry and maintain insurance in compliance with all provisions of this Agreement.
- (d) The Licensee shall cease to have any of the licenses, agreement, certificates, concessions, permits, rights or privileges required for the conduct of its business and operations which loss is not remedied by the obtaining of a replacement license, agreement, certificate, concession, permit, right or privilege within sixty (60) days of the loss thereof, if such loss would have a material adverse effect upon the ability of the Licensee to perform its obligations or enjoy its rights hereunder.
- (e) Licensee shall admit in writing an inability to pay its debts as such debts become due or Licensee shall (1) apply for or consent to the appointment of, or the taking of possession by, a receiver, administrator, custodian, trustee or liquidator of itself or of all or a substantial part of its property or assets, (2) make a general assignment for the benefit of its creditors, (3) commence a voluntary case under the U.S. Bankruptcy Code, (4) file a petition or otherwise commence a proceeding under any bankruptcy, insolvency reorganization winding-up, or composition or readjustment of debts or similar law, (5) fail to controvert in a timely and appropriate manner, or acquiesce in writing to, any petition filed against it in an involuntary case under the U.S. Bankruptcy Code, or (6) take any action for the purpose of effecting any of the foregoing; or a proceeding or case shall be commenced, without the application or consent of Licensee, in any court of competent jurisdiction, seeking (1) its liquidation, reorganization, dissolution or winding-up, or the composition or readjustment of its debts, (2) the appointment of a trustee, receiver, administrator, custodian, liquidator or the like of Licensee or of all or any substantial part of its assets, or (3) similar relief in respect of any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts, which proceeding is not dismissed within ninety (90) days thereafter.

18. **Rights Upon Default.**

- (a) Upon the occurrence of a default by Licensee, the City may forthwith terminate this Agreement or any particular Route Segment by thirty (30) days written notice to Licensee. The right of the City to terminate a specific Route Segment or this Agreement shall be in addition to, and not in substitution for, any other rights that the City may have at law or equity as a result of a default by Licensee.
- (b) Upon the occurrence of a default by the City, Licensee shall be entitled to terminate this Agreement or any particular Route Segment by thirty (30) days written notice to the City. Unless otherwise explicitly set forth in this Agreement, this shall constitute Licensee's sole remedy for the City's default.

19. **Remedies.** Upon the occurrence and during the continuance of any event of default, the non-defaulting party may, at its option, declare this Agreement to be in default and may, in addition to any other remedies provided herein, terminate this Agreement. No remedy is intended to be exclusive, but each shall be cumulative and in addition to and may be exercised concurrently with any other remedy available to City or Licensee at law or in equity.

20. **Termination.**

- (a) **Licensee's Liability for Early Termination.** If Licensee terminates this Agreement as to all or any Licensed Fibers for any reason, the Licensee shall pay to the City as liquidated damages for early termination, one hundred fifty percent (150%) of the applicable annual License Fees for the applicable Licensed Fibers for the year in which Licensee terminates ("Termination Fee"). All License Fees previously paid to the City shall be retained by the City.
- (b) **Removal of Licensee's Equipment.** Upon termination of this Agreement for any reason, Licensee shall remove all of Licensee's Equipment within ninety (90) days of the notice provided pursuant to Section 20 of this Agreement or within 90 days of the end of the Term, whichever occurs first. In the event Licensee does not remove said Equipment within the applicable timeframe, Licensee hereby authorizes the City to immediately remove and dispose of all Equipment, and the City shall not be liable to Licensee for any costs or reimbursements associated with the Equipment.

21. **Force Majeure Events.** Neither party shall be liable to the other for any failure of performance under this Agreement due to causes beyond its control, including but not limited to: acts of God, fire, flood or other catastrophes; any law, order, regulation, direction, action or request of the United States Government, or of any other government, including state and local governments having or claiming jurisdiction over such party, or of any department, agency, commission, bureau, corporation or other instrumentality of any one or more of these federal, state or local governments, or of any civil or military authority; national emergencies; insurrections; riots; wars; permitting authorities, pole or right-of-way owners; or strikes, lock outs, work stoppages or other labor difficulties (collectively, "**FORCE MAJEURE EVENTS**").

22. **Rights and Obligations of Licensee.** In addition to the rights and obligations of Licensee set forth elsewhere in this Agreement, Licensee shall:

- (a) have full and complete control, responsibility and liability for the signals distributed over the fiber optic components of the Licensed Fibers licensed by Licensee or for its benefit;
- (b) have full and complete control, responsibility and liability for the purchase, installation, construction and maintenance of the Licensee's Equipment;

- (c) have full and complete control, responsibility and liability for obtaining and maintaining any operating authority from any federal, state or local governmental body or agency that relates to the activities of Licensee under this Agreement, including Licensee's license of channel capacity on the Licensed Fibers.

23. **Access and Security.**

- (a) The City agrees to allow Licensee direct ingress and egress to the City's property at such times as may be required for Licensee to perform any appropriate testing, maintenance and repair on Licensee's Equipment. The City may require that a representative of the City accompany any representatives of Licensee on such visits to the City property. Employees and agents of Licensee or of a Licensee designee shall, while on the property of the City, comply with all rules and regulations including, without limitation, security/safety requirements and, where required by government regulations, receipt of satisfactory governmental clearances. The City shall have the right to notify Licensee that certain Licensee or Licensee designated employees are excluded if, in the reasonable judgment of the City, the exclusion of such employees is necessary for the proper security and maintenance of the City's facilities.
- (b) Notwithstanding the provisions of this Section, each party acknowledges that the operational efficiency of the other depends on the continuous availability of its trained personnel and, accordingly, both parties will act cooperatively to resolve any situations which may arise that threaten the security, operations or maintenance of either party's facilities prior to excluding any personnel.

23. **Assignment.** Licensee may not assign, transfer, delegate or in any other manner dispose of, any of its rights, privileges or obligations under this Agreement without the express written consent of City.

24. **Forum for Litigation.** In the event that litigation is required in order to resolve any dispute or disagreement connected with this Agreement, it is agreed by and between the parties hereto that venue and jurisdiction for any such litigation shall be in Hennepin County, Minnesota. Unless otherwise provided by law, any and all litigation between the parties hereto arising out of this Agreement shall be instituted and maintained in a court of competent jurisdiction in Hennepin County, Minnesota. Any cause of action arising by virtue of the laws of the United States shall be instituted in a court of competent jurisdiction in the State of Minnesota.

25. **Miscellaneous.**

- (a) **Counterparts.** This Agreement may be executed in counterparts each of which shall be deemed an original and all of which together shall constitute one and the same instrument, and in pleading or proving any provision of this Agreement, it shall not be necessary to produce more than one complete set of such counterparts.
- (b) **Captions; Gender.** Article and section headings contained in this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement. Whenever used herein the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall include all genders.
- (c) **Governing Law and Binding Effect.** This Agreement shall be construed and enforced in accordance with, and the validity and performance hereof shall be governed by the laws of the State of Minnesota. This Agreement shall bind and inure to the benefit of each of the parties and their successors and permitted assigns.

- (d) Waivers and Amendments. This Agreement may not be amended nor shall any waiver, change, modification, consent or discharge be effected, except by an instrument in writing adopted, in the case of an amendment, by each party and, in the case of a waiver, consent or discharge, by the party against whom enforcement of such instrument is sought. Any consent by either party to, or waiver of, a breach by the other party shall not constitute a waiver or consent to any subsequent or different breach. If either party shall fail to enforce a breach of this Agreement by the other party, such failure to enforce shall not be considered a consent to or a waiver of said breach or any subsequent breach for any purpose whatsoever.
- (e) Relationship Not a Partnership or an Agency. The relationship between Licensee and City shall not be that of partners or agents for one another and nothing contained in this Agreement shall be deemed to constitute a partnership, joint venture or agency agreement between them.
- (f) Notices. All notices, requests, demands, statements, reports and other communications under this Agreement shall be in writing and deemed to be duly delivered, if delivered in person, by overnight courier or by certified or registered mail:

If to City:                      City of St. Louis Park  
   5005 Minnetonka Boulevard  
   St. Louis Park, MN 55416  
   Attn: \_\_\_\_\_,  
   Chief Information Officer

With a copy to:                St. Louis Park City Attorney  
   Campbell Knutson, PA  
   Grand Oak Office Center I  
   860 Blue Gentian Road, Suite 290  
   Eagan, MN 55121

If to Licensee:                \_\_\_\_\_  
   \_\_\_\_\_  
   \_\_\_\_\_

With a copy to:                \_\_\_\_\_  
   \_\_\_\_\_  
   \_\_\_\_\_

Their Attorney

Either party hereto may change its mailing address by giving notice to the other pursuant to the provisions of this paragraph.

- (g) Disclaimers. There are no agreements, warranties or representations, express or implied either in fact or by operation of law, statutory or otherwise, including warranties of merchantability and fitness for a particular purpose or use, except those expressly set forth herein.
- (h) Entire Agreement. This Agreement, including the exhibits, schedules and annexes hereto, which are hereby incorporated by reference and made a part of this Agreement as if they were fully set forth herein, constitutes the entire agreement between City and Licensee with respect to the subject matter hereof and supersedes all prior agreements and understandings between them as to such subject matter, and there are no restrictions, agreements, arrangements or

undertaking, oral or written, between City and Licensee relating to the transactions contemplated hereby which are not fully expressed or referred to herein.

- (i) Severability. If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule or law or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner adverse to either party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner to the end that transactions contemplated hereby are fulfilled to the greatest extent possible.

**IN WITNESS WHEREOF**, and intending to be legally bound, the parties have executed this Agreement on the dates indicated below.

**CITY OF ST. LOUIS PARK**

Dated: \_\_\_\_\_

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: Mayor

Dated: \_\_\_\_\_

BY: \_\_\_\_\_

Name: Melissa Kennedy

Title: City Clerk

STATE OF MINNESOTA     )  
  ) ss.  
COUNTY OF HENNEPIN     )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, by \_\_\_\_\_ and by Melissa Kennedy, the Mayor and City Clerk, respectively, of the City of St. Louis Park, a Minnesota municipal corporation, on behalf of the corporation and pursuant to the authority granted by its City Council.

\_\_\_\_\_  
Notary Public



**EXHIBIT A**

Designation of Licensed Route Segments, Splice Vaults, and Licensed Fiber Stands

## EXHIBIT B

### City Network Fiber Acceptance Testing Procedures and Standards

The intent of this Exhibit is to identify the fiber acceptances testing procedures and standards used within the City Network. Deviations from these specifications may occur if City acquires a portion of the City Network from a third party pursuant to the Agreement.

1. All splices shall be fusion spliced. Mechanical splices are only allowed during temporary restoration and will be replaced within three (3) business days, with fusion splices.
2. Fibers shall be terminated with \_\_\_\_\_ connectors (typical return loss of 0.50 dB).
3. After end-to-end connectivity on the fibers has been completed, bi-directional OTDR span and power meter testing will be completed. City shall perform tests after the fiber cable is installed and the splicing enclosures have been completed and are in their final resting configuration with the cable vault or hand hole covers closed. This ensures that no micro or macro bending problems with the cable or fiber strands will contribute to the loss/attenuation measurements.
4. Power meter tests shall be completed to verify and insure that no fibers have been crossed at any of the splice points within the network. City shall test and record power level readings on all fiber strands in both directions of transmission (bi-directionally) using the 1310 & 1550 nm wavelengths.
5. All OTDR and power meter tests shall be completed as follows:
  - a. All OTDR traces shall be taken from both ends of a section (between adjacent Locations) and recorded using the 1310 & 1550 nm wavelength. Loss/attenuation measurements for each splice point from both directions shall be taken and recorded.
  - b. The end-to-end loss value as measured with an industry-accepted laser source and power meter should have an attenuation rating of less than or equal to the following:
    - i. At 1310 nm:  $(0.35 \text{ dB/km} \times \text{km of cable}) + (\text{number of connectors} \times 0.50) + (0.05 \times \text{number of splices})$ .
    - ii. At 1550 nm:  $(0.25 \text{ dB/km} \times \text{km of cable}) + (\text{number of connectors} \times 0.50) + (0.05 \times \text{number of splices})$ .
  - c. City's loss/attenuation objective for each fiber optic splice is 0.05 dB when measured in one direction with an OTDR test set (excluding connector loss, which is typically 0.50 dB per mated connector pair). If after three attempts this parameter is not met, the splice will be marked as Out-Of-Spec (OOS) and the splice will remain provided the average loss/attenuation value of all splices on an individual fiber basis shall not exceed 0.10 dB for the entire ring or subsystem.
  - d. For bi-directional OTDR testing, the distance from Location "A" and Location "Z" shall be recorded for each splice point. The loss/attenuation at each splice point shall be recorded at both wavelengths (1310 nm & 1550 nm) in each direction. City shall then average the two readings to obtain the final average splice loss/attenuation for each splice point of each fiber strand within the fiber optic cable.
  - e. Each fiber strand color must be recorded along with its buffer tube color or the ribbon color. The laser source transmit power level using the 1310 & 1550 nm wavelengths will always be recorded together with the receive power level reading at the receiving end of the test.
6. OTDR traces will be taken and splice loss measurements recorded. City will store OTDR traces on electronic media. Loss measurements will be recorded using an industry accepted laser source and a power meter. Copies of all data sheets and tables and one set of diskettes with all traces will be available to Licensee.
7. Following emergency restoral, City personnel shall perform span test documenting end to end attenuation measurement of each fiber and will be completed in both directions at 1310 & 1550 nm wavelengths. Upon permanent repair, new splice loss readings should be approximately the original splice loss specifications.

**EXHIBIT C**

City Fiber Building and Location on the Fiber Equipment Rack (if applicable)

## **EXHIBIT D**

### Maintenance Specifications

1. Notice. City shall provide Licensee with telephone, facsimile, or written notice of all non-emergency planned network maintenance no later than seven (7) business days prior to performing maintenance that, in its reasonable opinion, has a substantial likelihood of affecting Licensee's traffic. If City's planned activity is canceled or delayed, City shall promptly notify Licensee and shall comply with the provisions of the previous sentence to reschedule any delayed activity.
2. Standard of Care; Cooperation. In performing its services hereunder, City shall take workmanlike care and make commercially reasonable efforts to prevent impairment to the signal continuity and performance of the Licensed Fibers. In addition, City shall reasonably cooperate with Licensee in sharing information and analyzing the disturbances regarding the cable and/or fiber facilities.
3. Licensee's Equipment. Nothing contained herein shall make City responsible for the Licensee's Equipment.
4. Escalation List. City shall, at Licensee's request, provide Licensee an operations escalation list for use in reporting and seeking redress of exceptions noted in City's performance of routine maintenance and non-routine maintenance.