



City of San Leandro

Meeting Date: March 16, 2015

Staff Report

File Number: 15-161 **Agenda Section:** CONSENT CALENDAR

Agenda Number: 8.F.

TO: City Council

FROM: Chris Zapata
City Manager

BY: Rich Pio Roda
City Attorney

FINANCE REVIEW: David Baum
Finance Director

TITLE: Staff Report for a Resolution Approving the First Amendment to the License Agreement between the City of San Leandro and San Leandro Dark Fiber LLC

BACKGROUND and ANALYSIS

Effective October 17, 2011, the City and San Leandro Dark Fiber LLC (SLDF) entered into a License Agreement that provided SLDF access to the City's conduit within the public right of way to install, construct (where necessary), and manage a fiber optic loop within the City's downtown and industrial areas. This First Amendment to the License amends the original license to clean-up language and processes between the City and SLDF, and to incorporate rates, terms and conditions applicable to SLDF's use of the Expanded Property, as defined below.

Pursuant to the Original License, SLDF currently installs and operates fiber optic cables and related facilities (the "**Project**" or "**Projects**") in existing City-owned and managed conduit located on City owned real property and/or within the City's right-of-way. On September 27, 2012, the City received verification that it was approved for a 50%, \$2,120,000 matching grant from the federal Economic Development Agency ("EDA") that enables the City to construct an additional 7.5 miles of conduit (the "**Expanded Property**"). Construction of the additional 7.5 miles of conduit will require the City to match the federal grant through the inclusion of property valued at market rate, in-kind services and cash, for a total estimated cost of \$4.3 million.

The value of the City's contribution to the Project is approximately \$6 million and the value of the City's contribution to the Expanded Property is approximately \$4.6 million including the EDA grant, for a total City contribution of approximately \$10.6 million. In order to carry out and complete the Project, SLDF must have access to the Expanded Property and the City's right-of-way to carry out additional work to expand the fiber optic loop and access.

This First Amended License acknowledges the significant investment in the Project by the City through securing the Expanded Property and providing in-kind services and cash for the public interest, welfare and benefit of the City's residents and businesses. This First Amendment also acknowledges the City's responsibility to ensure service delivery to the San

Leandro community is as transparent and high quality as possible. To that end, this First Amendment incorporates a Fiber Optic Responsibility Matrix, a Service Level Agreement, Standard Operating Procedures, and adjustments to the responsibilities as to ownership and maintenance of the facilities within the Project, none of which are in the current draft of the agreement.

This First Amendment also establishes responsibilities for payment when the initial term of the license concludes, and clarifies the procedure for how to value the fiber optic loop, as an asset, if SLDF decides to sell the facilities installed within the conduit. This First Amendment also imposes, to the fullest extent permitted by law and industry practice, reporting requirements upon SLDF regarding the services provided over the fiber optic network. SLDF will also dedicate and convey to the City additional fiber optic strands for the City's exclusive use. The City currently owns 30 strands that were dedicated and conveyed by SLDF to the City, without restrictions, as part of the original license. As part of this First Amendment, SLDF will convey an additional 42 strands in the Expanded Property on top of the 30 for a total of 72 strands conveyed and dedicated to the City in the Expanded Property. The 42 additional strands will be subject to some restrictions related to use for the public interest, and furthermore, that SLDF has the right to lease 40 of the 72 strands from the City at reasonable rates.

All other terms of the Original License remain in full force and effect.

Fiscal Impact

No additional cost to the City is expected at this time.

ATTACHMENT

Attachment to Resolution

- DRAFT First Amendment to License Agreement with San Leandro Dark Fiber

PREPARED BY: Richard D. Pio Roda, City Attorney
David Baum, Finance Director (for Fiscal Impact)



City of San Leandro

Meeting Date: March 16, 2015

Resolution - Council

File Number: 15-162 **Agenda Section:** CONSENT CALENDAR

Agenda Number:

TO: City Council

FROM: Chris Zapata
City Manager

BY: Rich Pio Roda
City Attorney

FINANCE REVIEW: Not Applicable

TITLE: RESOLUTION Approving the First Amendment to the License Agreement
Between the City of San Leandro and San Leandro Dark Fiber LLC

WHEREAS, a First Amendment to the License Agreement between the City of San Leandro and San Leandro Dark Fiber LLC, a copy of which is attached, has been presented to this City Council;

WHEREAS, the City Council is familiar with the contents thereof; and

WHEREAS, the City Manager recommends approval of said agreement.

NOW, THEREFORE, the City Council of the City of San Leandro does RESOLVE as follows:

That the First Amendment is hereby approved; and

That, the City Manager may make minor edits or changes, and execute the Amendment, subject to approval as to form by the City Attorney.

EXHIBIT F

FIRST AMENDMENT TO LICENSE AGREEMENT BETWEEN THE CITY OF SAN LEANDRO AND SAN LEANDRO DARK FIBER LLC

THIS FIRST AMENDMENT TO LICENSE AGREEMENT (this “**First Amendment**”) is entered into effective as of March 4, 2015 (“**Effective Date**”) by and between the City of San Leandro, a municipal corporation (“**City**”) and San Leandro Dark Fiber LLC, a limited liability company (“**SL Dark Fiber**” or “**SLDF**”). This First Amendment shall be appended to the Original License as Exhibit F and shall be incorporated into the Original License. All Sections and provisions of the Original License remain unchanged and shall apply to the Project in the Expanded Property unless this First Amendment expressly sets forth a rate, term or condition specific to the Project installed in the Expanded Property, or expressly changes a term, provision, or condition in the Original License. The City and SL Dark Fiber are sometimes hereinafter referred to individually as “**Party**” and collectively as the “**Parties**.”

RECITALS

- A. Effective October 17, 2011, the City and SL Dark Fiber entered into a License Agreement (“**Original License**”). This First Amended License amends the Original License to incorporate rates, terms and conditions applicable to SL Dark Fiber’s use of the Expanded Property, as defined below.
- B. Pursuant to the Original License, SL Dark Fiber currently installs and operates fiber optic cables and related facilities (the “**Project**” or “**Projects**”) in existing City-owned and managed conduit located on City owned real property and/or within the City’s right-of-way. The City owned conduit identified in the Original License shall be known as the “**Original Property**.” The Expanded Property as more thoroughly described in Recital E below, shall be depicted as Exhibit 1 attached hereto. All of the maps identified in Exhibit 1 shall be made a part hereof, and shall be conclusive as to the identification of the “**Property**” to which SL Dark Fiber is granted access under this First Amendment.
- C. Prior to execution of the Original License, on June 6, 2011, the Parties entered into an Exclusive Negotiating Rights Agreement that allowed City Staff to pursue negotiations and grant SL Dark Fiber with exclusive negotiating rights regarding SL Dark Fiber’s proposed development of the Project.
- D. Prior to execution of the Original License, the City granted limited permission to SL Dark Fiber to enter onto and use the Property to install and operate fiber optic cables and related facilities. Upon completion of this portion of the Project, the Parties executed the Original License and proceeded in earnest with the Project pursuant to the terms and conditions of the Original License Agreement.
- E. On September 27, 2012, the City received verification that it was approved for a 50%, \$2,120,000 matching grant from the federal Economic Development Agency (“EDA”) that enables the City to construct an additional 7.5 miles of conduit (the “**Expanded Property**”).
- F. Construction of the additional 7.5 miles of conduit will require the City to match the federal grant through the inclusion of Property valued at market rate, in-kind services and cash, for a total estimated cost of \$4.3 million.
- G. The value of the City’s contribution to the Project is approximately \$6 million and the value of the City’s contribution to the Expanded Property is approximately \$4.6 million including the EDA grant, for a total contribution to the Project from the City of approximately \$10.6 million.
- H. In order to carry out and complete the Project, SL Dark Fiber must have access to the Property and the City’s right-of-way to carry out the Scope of Work set forth in Exhibit 2 in exchange for a grant of fiber strands to the City.
- I. This First Amended License acknowledges the significant investment in the Project by the City through securing the Expanded Property and providing in-kind services and cash for the public interest, welfare and benefit of the City’s residents and businesses.
- J. This First Amendment acknowledges the City’s responsibility to ensure service delivery to the San Leandro community is as transparent and high quality as possible.

K. This First Amendment incorporates a Fiber Optic Responsibility Matrix (“FORM”) [Exhibit 4], a Service Level Agreement (“SLA”) [Exhibit 5], and Standard Operating Procedures (“SOP”) [Exhibit 7], and adjustments to the responsibilities as to ownership and maintenance of the facilities within the Project.

In view of the foregoing recitals above and the covenants below, all of which constitute good and valuable consideration, with the intention that all recitals are true and correct and made a part of this First Amendment, the Parties agree as follows:

ARTICLE I ADDITIONAL DEFINITIONS

Except for the new definitions set forth in this section, all definitions set forth in Article I of the Original Agreement remain unchanged.

- 1.1 “Expanded Property” is defined in Recital E and Exhibit A-1 and A-2.
- 1.2 “Lateral” is defined in Section 4.3(b).
- 1.3 “Main” is defined in Section 4.3(b).
- 1.4 “Original Property” is defined in Recital B and Exhibit A of the Original License.
- 1.5 “SL Dark Fiber Studies” is defined in Section 2.14.

ARTICLE II GRANT OF LICENSE; LICENSE FEES; TERM; CONVEYANCE ARTICLE III OF FIBER TO CITY; DUE DILIGENCE

- 2.1 License Fee – Expanded Property. Upon completion by the City of the Expanded Property during Years 1 through 10 of the Initial Term of the Original License, SL Dark Fiber shall pay the City the \$1.00 (one dollar) per year license fee for fiber installed in the Project. Beginning on the first day of Year 11 of the Initial Term of the Original License, SL Dark Fiber shall pay an amount per linear foot per year, or prevailing market rate, whichever is lower, for all fiber cable installed in the Original and Expanded Property. This amount shall be determined by mutual agreement of the Parties.
- 2.2 Interest on Unpaid Undisputed Fees. Any amount due from SL Dark Fiber to the City that is not paid when due shall bear interest at the lesser of ten percent (10%) per annum or the maximum rate which the City is permitted by law to charge, from the date such payment is due until paid, but the payment of such interest shall not excuse or cure any default by SL Dark Fiber under this First Amended License.
- 2.3 License Fee Review and Increase. Commencing in Year 12 of the Original License and for every subsequent year within the Initial Term, SL Dark Fiber shall pay an increased License Fee equal to either the negotiated rate in Section 2.1 or the market rate for conduit at that time, calculated as set forth in Section 2.4. This increased License Fee shall then be payable for the remainder of the Initial Term, adjusted annually for inflation based upon the U.S. Consumer Price Index – U (“CPI-U”).
- 2.4 Market Rate. Market rate shall be determined by mutual agreement of the Parties. If the Parties are unable to agree, the rate shall be set at the median of the ten most recently available conduit occupancy fee disclosures in interconnection agreements filed with the California Public Utilities Commission 180 days prior to the rate taking effect. If multiple conduit occupancy fees are disclosed in a single interconnection agreement then the lowest rate for subdivided or shared conduit shall be used. If this information is no longer collected or available then the most recent comparable information may be used.
- 2.5 Initial Term. This First Amendment shall commence on the date first signed by the Parties and shall have an **Initial Term** co-terminous with the Original License.
- 2.6 Third Party Access to, Ownership of, and City Ownership of the Conduit, Cable and Fiber Optic Strands.

(a) The City hereby agrees that SL Dark Fiber may enter into agreements with affiliates or third parties to provide telecommunications services using fibers installed in the Expanded Property.

(b) In addition to the thirty (30) strands of fiber optic cable and related facilities dedicated to and owned by the City in the Original and the Expanded Property under the Original License and this First Amendment, SL Dark Fiber conveys and dedicates to the City ownership and exclusive use of an additional thirty-two (32) strands (“**City Strands**”), in any area of the Expanded Property, where there is sufficient capacity for SL Dark Fiber to install a 288-strand fiber cable, for a total conveyance and dedication to the City of 72 strands. If space constraints within the Expanded Property limit SL Dark Fiber to install fewer than 288 strands of fiber, then SL Dark Fiber shall convey and dedicate ownership of twenty-five (25%) percent of the number of fiber strands installed in the Expanded Property. The Parties agree that there are no restrictions on the City’s use of the 30 City Strands conveyed and dedicated to the City in the Original and the Expanded Property. The City acknowledges and agrees that it will use the additional 42 of the 72 City Strands in the Expanded Property solely for internal communications needs and public projects, and may not resale, lease or otherwise make available all or any portion of the additional 42 of the 72 City Strands to a commercial entity, including but not limited to telecommunications carriers, Internet Service Providers, or VoIP providers, other than SL Dark Fiber. The Parties further agree that SL Dark Fiber shall have a right at any time to lease up to 40 of the additional 42 City Strands in the Expanded Property at a mutually agreeable rate to be determined based on market rates for wholesale fiber strands at that time.

(c) Upon written acceptance by the City, main conduit installed by SL Dark Fiber shall be dedicated to the City and shall become part of the Property, and SL Dark Fiber shall execute any document or instrument required by the City to evidence such dedication or transfer such that the main conduit installed is owned by the City, and is depicted in Exhibit A as an addition to the Property. The Parties acknowledge and agree to comply with Exhibit 4, the FORM, to guide the ownership and responsibilities for main conduit and lateral conduit installed.

(d) The City shall have the right to use all City strands located in the Project and agrees that physical access to the City strands shall be carried out in compliance with all standards and operating procedures, as defined in the Original License and this First Amended License, when accessing the City strands. SL Dark Fiber guarantees that the City shall have access to City strands in all areas of the Project, regardless of the ownership of the conduit or cable in any area.

(e) The Parties acknowledge and agree that the City may own fiber optic strands and related facilities not included in the Project but within the Property, and the City may, in its sole discretion, obtain and install additional fiber optic strands within the Property so long as such addition does not interfere with SL Dark Fiber’s use of the Property. Any such fiber added to the Property by the City would not be included in or added to the Project. The Parties acknowledge and agree that such City assets are outside of the scope of the Original License and this First Amendment.

2.7 GIS data. Upon execution of this Agreement SL Dark Fiber shall provide to the City electronic GIS and mapping data for the Project and related facilities, including all lateral conduit, third party conduit and ducts, access and termination enclosures, and complete fiber, cable, logical and physical network data, including fiber count and identification of City Strands.

2.8 Construction Drawings. Prior to acceptance into the Property of any newly installed fiber or conduit, SL Dark Fiber shall, at its sole cost and expense, procure and provide to City complete construction drawings and maps in electronic format of any additions made by SL Dark Fiber to the Project, including the number and size of fibers, the length of the routes, and the access points, and any unused conduit identified within the Property. The routes should be described in linear feet, and each street should be identified.

2.9 City’s Option and Right of First Refusal Prior to Sale or Transfer.

(a) If at any time during the Initial or Renewal Terms of this First Amendment, SL Dark Fiber desires to sell, transfer or otherwise dispose of fiber installed in the Property

sufficient to constitute a change in control, SL Dark Fiber must first notify the City. The City shall have the Option and Right of First Refusal for one hundred and eighty (180) days after receipt of such notice within which to elect in writing to purchase some or all of the fiber optic cable and/or associated facilities that make up the Project, including fiber installed in the Expanded Property. The addition of investment capital by a third party shall not trigger the City's Option and Right of First Refusal.

(b) If the City elects to exercise its Option and Right of First Refusal to purchase SL Dark Fiber's cable and associated facilities, the City's purchase price shall first be determined through mutual agreement of the parties. If the parties are unable to come to a mutual agreement within 60 days, then both parties agree to engage in the following arbitration procedure to determine the purchase price:

Each party will select an independent and reputable third party appraiser of similar fiber optic cable facilities within thirty (30) days after the expiration of the 60-day period. The two appraisers will each independently appraise the fair market value of the Project. Provided that the difference in the two appraisals does not exceed ten percent (10%) of the lower of the two appraisals, the fair market value shall be the average of the two appraisals, and such calculation shall be binding on the parties. If either party fails to select an independent and reputable appraiser within the time required by this covenant, the fair market value will be conclusively deemed to equal the appraisal of the independent and reputable third party appraiser timely selected by the other party.

If the difference between the two (2) appraisals referred to above exceeds ten percent (10%) of the lower of the two (2) appraisals, the two (2) selected appraisers will select a third appraiser who will determine which of the two (2) appraisals more closely reflects the fair market value for the Project.

The determination of the appraisals described above shall be binding on the parties and not subject to judicial review by arbitration.

Each party shall pay for the costs of its own appraisal, and, if applicable, each shall pay for one-half of the cost of the third appraisal. In determining the fair market value, the appraisers selected under this Agreement will consider all opinions and relevant evidence submitted to them by the parties or otherwise obtained by them. The appraisers will set forth their determination in writing, together with their respective opinions and the considerations on which the opinions are based, with a signed counterpart to be delivered to each party within thirty (30) days after commencing the appraisal.

(c) If the City elects to exercise its Option and Right of First Refusal to purchase SL Dark Fiber's fiber optic cable and associated facilities installed in the Expanded Property, it acknowledges and agrees that it will assume and continue to provide facilities to support any unexpired customer(s). The City also agrees to support and honor agreement(s) for telecommunications services provided on SL Dark Fiber's facilities through any affiliate of SL Dark Fiber or agreements with third parties who were in contract with SL Dark Fiber to use SL Dark Fiber's facilities to provide telecommunications services, provided such agreements satisfy the terms of this License. The City will continue to support the agreements explained in the preceding sentence only for the remaining terms of such agreements and any prior exercised or in contract extensions and only if such agreements were effective at the time that SL Dark Fiber gave written notice to the City of SL Dark Fiber's intent to sell, lease or otherwise dispose of its portion of the Project.

(d) If the City fails or elects not to exercise its Option and Right of First Refusal after engaging in the procedure described in section 2.8(b), then SL Dark Fiber may proceed to sell, assign or otherwise dispose of the Project upon the City's written consent, which shall not be unreasonably withheld. The City acknowledges and agrees that the purchasing entity shall have the right to use the portions of the Project that the City does not own to continue providing service to support any unexpired customer agreement for telecommunications services provided by SL Dark Fiber or any affiliate or third party with whom SL Dark Fiber has contracted to provide telecommunications services, provided such agreement satisfies the terms of this License and any extensions.

2.10 Termination, Abandonment or Expiration of License or Project.

(a) This First Amendment may be terminated at any time by mutual agreement of the Parties regardless of whether the Original License is terminated.

(b) Either Party shall have the right to terminate this License upon the other Party's material breach of this License in which the breaching Party fails to commence a cure of such breach within ten (10) calendar days of written notice of default from the non-breaching party. SL Dark Fiber shall have the right to terminate this License, effective upon ten (10) days written notice to the City, if the results of its investigation into the feasibility of the Project or the Property inspection described in Section 2.12 below are unsatisfactory or if SL Dark Fiber is unable to obtain other necessary approvals, certifications, rights or interests. Neither Party shall have the right to seek an award of damages as a result of the termination of this License pursuant to this Section 2.9(b). If SL Dark Fiber terminates this First Amendment prior to any portion of the Projects becoming operational (*i.e.*, the Projects are capable of supporting telecommunications services), then ownership of any fiber optic cable or associated facilities already installed in the Expanded Property will transfer automatically to the City.

(c) After the first five (5) years of the Initial Term, the City shall have the right to terminate this First Amendment in the event that SL Dark Fiber abandons the Project installed in the Expanded Property for at least one hundred twenty (120) days. For purposes of this Agreement, "abandons" or "abandonment" means the intent to absolutely surrender or relinquish the Projects. Periods of disuse due to force majeure events, or other events causing the Projects to be unusable or in disrepair shall not be interpreted or construed as abandonment. Force majeure is defined as any inability of a Party to perform because it is directly prevented or delayed by reason of strikes, lockouts, labor disputes, supply shortages, utility outages, civil disorders, actions of governmental authorities, actions of civil or military authority, national emergency, insurrection, riots, war, acts of God, fire, floods, epidemics, freight embargoes, power outages or other causes beyond the reasonable control of the party. The City shall attempt to contact SL Dark Fiber at the address contained herein for notices at least once per month during the 120 day period of asserted abandonment to notify SL Dark Fiber that the City believes the Project has been abandoned.

(d) Both Parties acknowledge and agree that if telecommunications services are being provided to customers, any termination of this First Amendment (whether by mutual consent or due to breach) that would affect or terminate such telecommunications services is subject to regulatory requirements and that they will comply with such regulatory requirements. In the event of abandonment of SL Dark Fiber, the City shall not be bound to any agreements between SL Dark Fiber and any third parties or affiliates in contract with SL Dark Fiber to access the Project installed in the Expanded Property.

(e) Ownership of the Project Upon Termination or Abandonment. Upon termination or expiration of this License, or abandonment of the Project installed in the Expanded Property, ownership shall automatically transfer to the City.

(f) Effect of Termination on License. Upon termination as provided herein, or upon the expiration of the Initial Term and any extensions thereof, this First Amendment shall forthwith be void, and there shall be no further liability or obligation on the part of either of the Parties or their respective officers, employees, agents or other representatives; provided however, that certain provisions of this First Amendment shall survive such termination, as specified herein.

(g) Access to Unused Conduit Space. After the first five (5) years of the Initial Term, the City may permit others access to unused conduit space in the Expanded Property and such access will not constitute a reduction in capacity of conduit specified for SL Dark Fiber use.

2.11 Nonexclusive License. SL Dark Fiber understands that this License does not provide SL Dark Fiber exclusive use of the Expanded Property and that the City may permit other providers of telecommunications service or other entities to install equipment or devices within or on the Expanded Property. However, in granting others a similar license for access to and use of the Property, or for the City's own use, the City agrees that it will not make or allow a subsequent change to the Expanded Property that materially affects SL Dark Fiber's ability to use the Expanded Property for the Project, including the reduction of conduit capacity specified for use by

SL Dark Fiber, or that materially interferes with or degrades the services provided by SL Dark Fiber.

- 2.12 Inspection of Property; Right of Entry Agreement. At its sole discretion, SL Dark Fiber must inspect, examine, survey, and prepare any studies, surveys, plans, specifications and reports (“**SL Dark Fiber Studies**”) that SL Dark Fiber deems necessary or desirable to determine the viability of the Project in the Expanded Property. Such studies may include, without limitation, marketing, feasibility, seismic and environmental studies, financial feasibility analyses and design studies. SL Dark Fiber’s inspection, examination, survey and SL Dark Fiber Studies shall be at SL Dark Fiber’s sole expense. SL Dark Fiber shall be responsible for obtaining the City’s advance written permission for access to the Property as may be necessary to prepare the SL Dark Fiber Studies. SL Dark Fiber shall provide the City with a summary of the results of SL Dark Fiber Studies for the limited purpose of notifying the City that SL Dark Fiber has determined that the Property is suitable for the Project. After any necessary inspection, examination, survey or review SL Dark Fiber shall repair, restore and return the Property to the condition it was immediately preceding SL Dark Fiber’s entry therein at SL Dark Fiber’s sole expense, unless otherwise directed by the City. The provisions of this Section shall survive the expiration or earlier termination of this License.
- 2.13 AS-IS Conveyance. The City hereby grants this License to SL Dark Fiber for the Expanded Property in its “as-is, where-is” condition existing on the Effective Date, and SL Dark Fiber acknowledges that, except as otherwise expressly set forth in this License, the City makes no representations, guaranties, or warranties to SL Dark Fiber with regard to the condition of the Expanded Property or the fitness or suitability thereof for SL Dark Fiber’s purposes, including but not limited to, matters pertaining to topography, utilities, soil, subsoil, presence or absence of fill, presence or absence of Hazardous Materials (as defined in Section 11.3(b) of the Original License), drainage, flood zone designation, environmental laws, rules, or regulations. The City shall allow SL Dark Fiber to have access to the Property at no charge for inspection and verification of the suitability of the Property for the Projects. SL Dark Fiber shall rely solely on its own independent investigation and judgment as to all matters relating to the Expanded Property and the suitability of the Expanded Property for SL Dark Fiber’s use. SL Dark Fiber represents that it has, prior to the execution of this License, made investigations of the Property, including without limitation such inquiries of governmental agencies, soils testing, tests and inspections as SL Dark Fiber has deemed necessary to determine the condition of the Expanded Property and that SL Dark Fiber, by execution hereof, accepts the Expanded Property in its current “as-is, where-is” condition and state. Notwithstanding this provision, the City agrees that it will negotiate with SL Dark Fiber in good faith to accommodate SL Dark Fiber’s capacity needs, including replacing, relocating or sharing City fiber optic conduit or related facilities with SL Dark Fiber. Any costs arising from such accommodation shall be mutually agreed to in writing by the City and SL Dark Fiber.
- 2.14 Financial Feasibility. Prior to the execution of this License, SL Dark Fiber must provide the City with confirmation that it has sufficient financial resources and will fund the Project.
- 2.15 Reporting.
- (a) Together with any applicable License Fee, within 45 days of the close of each fiscal year, SL Dark Fiber shall send to the City a confidential written annual report detailing the following information: The names and addresses of all third party telecommunications providers contracted with SL Dark Fiber to provide telecommunications services within the City of San Leandro; fiber optic capacity used and capacity available; revenue and expense statements; and any other additional information necessary to verify compliance with the requirements of the Original License and this First Amendment. Such report is designated a SL Dark Fiber trade secret exempt from disclosure under the California Public Records Act.
- (b) SL Dark Fiber shall provide to the City, on an annual-basis, current and historical performance data (to the extent it is reasonably feasible for SL Dark Fiber to collect such data) for all dark fiber offered by SL Dark Fiber. Performance Metrics shall include the following, commencing on the date of this Amendment:
1. Average time to turn up end user customers, defined as the average number of days between receipt of an order to install service and completion of the installation, including provisioning of termination and/or access points as ordered.

2. Total uptime of network, defined as the percentage of time that 100% of the Project is available for use.
3. Fiber strand utilization on a network-wide basis, defined as the number of fiber strands that are assigned to a) active use, b) reserve capacity, c) City Strands, d) not available for use.
4. Maximum throughput on a network-wide basis, defined as the maximum percentage of throughput available for data link service.
5. Effective throughput on a network-wide basis, defined as the average percentage of throughput available for use for which SL Dark Fiber provides data link service.
6. Throughput availability on a network-wide basis, defined as the percentage of time that the effective throughput is available for use.
7. Log of all network components, including fiber strands and physical nodes, outages due to failure, damage, maintenance or other causes.

(c) The Parties agree and acknowledge that the information required by this section is highly proprietary and confidential business information protected from disclosure under the California Public Records Act, and therefore the City may publish this information in any City publication, and on the City's website with written consent of SL Dark Fiber.

ARTICLE IV

SCOPE OF WORK; PERFORMANCE OF WORK; DEVELOPMENT SCHEDULE

4.1. Scope of Work. Pursuant to this First Amendment, the City authorizes SL Dark Fiber to install the Project in the Expanded Property (hereinafter "**Permitted Work**") as described in the "**Scope of Work**," attached as Exhibit 2 and incorporated herein by this reference. The performance of the Scope of Work shall be at SL Dark Fiber's own risk, subject to inspection with or without notice at any and all times by the City, final approval by the City and subject to the City's review of SL Dark Fiber's final plans for the Project. Any improvements made to the Property as a result of the Scope of Work shall be for the benefit of the City, and all costs shall be borne by SL Dark Fiber. Exhibit 2 shall include a copy of each and every scope of work and City consent or approval provided, each of which shall be incorporated herein and made a part hereof.

ARTICLE V

ECONOMIC BENEFITS; CONFORMANCE WITH GENERAL PLAN; STANDARD OPERATING PROCEDURES

5.1. Economic Benefits of Project. The approval by the City Council of this First Amended License confirms that the Project is consistent with the City's Economic Development Goals and the City's General Plan. SL Dark Fiber understands and agrees that "San Leandro" is a brand that is of great importance to the economic development goals of the City. Accordingly, all marketing materials related to services provided through SL Dark Fiber or LSL shall acknowledge the City of San Leandro in a positive and business friendly tone. The City reserves the right to market the Project as an economic development asset in all of the City's marketing collateral and outreach, including but not limited to, the Internet, conferences, written materials, social media, etc.

5.2. Addition of Other Businesses to the Project. Exhibit C of this First Amended License shall identify third parties that SL Dark Fiber is in contract with to provide telecommunications services utilizing the Project. Such list shall be updated from time to time upon the City's request. The disclosure of such affiliates or third parties is provided as a courtesy only, and shall not be construed as a request for approval from the City.

5.3. Standard Operating Procedures and Fiber Optic Responsibility Matrix. SL Dark Fiber agrees to abide by and comply with Exhibit 7, the City's Standard Operating and Construction Procedures ("SOP"), which may be amended from time to time, and to Exhibit 4, the Fiber Optic Responsibility Matrix (the "FORM"), which is incorporated herein and made a part hereof. The purposes of the SOP and the FORM are to ensure that the Project remains consistent with the City's General Plan, Economic Development Goals and Objectives; that the Project is used effectively as a tool to improve economic development and create jobs; and that the Project continues to prioritize and serve the best interests of the City, and its residents and businesses.

(a) The SOP and FORM are binding to third party providers that SL Dark Fiber may contract with to provide telecommunications services using facilities that are included in the Projects.

(b) SL Dark Fiber acknowledges and agrees that it will not allow any third party other than its authorized contractor to engage in construction or to install fiber or equipment in the Property or Expanded Property. SL Dark Fiber agrees that any contractor that it authorizes shall comply with the City's Standard Operating and Construction Procedures set forth in Exhibit 7.

(c) As provided in the SOP and the FORM, "**Lateral**" is defined as conduit or cable, one end of which terminates within the City's right-of-way and the other end which terminates at a point outside of the City's right-of-way. "**Main**" is defined as conduit or cable, both ends of which terminate within the City's right-of-way.

5.4. Service Level Agreement. The City's standard SLA is attached hereto as Exhibit 5, and made a part hereof.

IN WITNESS WHEREOF, the Parties have executed this License as of the date first written above.

City of San Leandro

By: _____
Chris Zapata, City Manager

APPROVED AS TO FORM:

By: _____
Richard D. Pio Roda, City Attorney

ATTEST:

By: _____
Marian Handa, City Clerk

SL Dark Fiber, a limited liability company

By: _____
J. Patrick Kennedy, SL Dark Fiber Managing Member

EXHIBIT 1

MAP OF THE EXPANDED PROPERTY INCLUDED IN THIS FIRST AMENDMENT

[[Map to be inserted -- EDA conduits; A2 thru AX Plats of additional conduits included by agreement]]

DRAFT

EXHIBIT 2
SCOPE OF WORK FOR EXPANDED PROPERTY

DRAFT

EXHIBIT 3
POTENTIAL THIRD PARTY TELECOMMUNICATIONS PROVIDERS LIST

- 1) Lit San Leandro (510)-991-0969
- 2) Crosslink Networks (510)-663-5686
- 3) PAXIO (408)-343-8200

DRAFT

EXHIBIT 4
FIBER OPTIC RESPONSIBILITY MATRIX

- Main – Conduit or cable that terminates at both ends at a box or manhole within the public right of way.
- Lateral – A conduit or cable that terminates at one end in a box or manhole within the public right of way and the other end serves as a point of connection for an end device (*i.e.* modem, termination panel, etc.)
- SLDF – San Leandro Dark Fiber
- CoSL – City of San Leandro
- PO – Property Owner served by lateral (2)

Facility	Time Period	Ownership	Maintenance /	Operation	USA Marking	Notes
Conduit Mains	Constructed Prior to 2011	CoSL	CoSL	CoSL	CoSL	Available for use by SLDF in conduits as shown
	Constructed by SLDF	CoSL	CoSL	CoSL	CoSL	Requires written consent by City per Section 8.6 An encroachment
	Constructed	CoSL	CoSL	CoSL	CoSL	Not available to SLDF by
	Constructed	CoSL	CoSL	CoSL	CoSL	Not available to SLDF by
Conduit	Constructed	CoSL	CoSL	CoSL	CoSL	Not available to SLDF by
	Constructed	SLDF (4)	SLDF (4)	SLDF (4)	SLDF	Customer agreements state
	Constructed	CoSL	CoSL	CoSL	CoSL	Not available to SLDF by
Fiber	Main Cable	CoSL	CoSL	CoSL	CoSL	
	Main Cable Installed by SLDF	SLDF	SLDF	SLDF	SLDF *	* CoSL will mark if conduit containing cable has been accepted into
	Lateral Cable	CoSL	CoSL	CoSL	CoSL	
	Lateral Cable installed by	SLDF	SLDF	SLDF	SLDF * (3)	* CoSL may mark at its sole discretion (If “City

	Facility	Ownership	Maintenance /	Operation	USA Marking	Notes
Fbr Strands	W/n cable installed by CoSL	CoS	CoS	CoSL	*	* See Fiber Cable that contains the strands
	W/n cable installed by SLDF	SLD	SLD	SLDF	*	* See Fiber Cable that contains the strands
	Within Cable installed by SLDF owned (5) by CoSL per	CoSL (1)	SLDF	CoSL	*	* See Fiber Cable that contains the strands + SLDF to make all connections to "City
	Within cable installed by third party	TBD	TB	TBD	TBD	AC Transit BRT for Example Not determined at this time
Other	Boxes Installed on Main Lines *	CoS	CoS	CoSL	CoSL	* Includes boxes where laterals connect to
	Boxes Installed on Lateral Lines	SLDF	SLDF	SLDF (4)	SLDF (4)	
	CoSL Installed Boxes	CoS	CoS	CoSL	N/	
	CoSL Installed Splice Enclosures	CoS	CoS	CoSL	N/	
	SLDF Installed Splice Enclosures	SLD	SLD	SLDF	N/	
	End devices (modems, termination panels, etc.)	See Notes	See Notes	See Notes	See Notes	Responsibility is determined by the fiber strand connected to the device

(1) Revised 7/3/2014(2) Revised 7/10/2014 (3) Revised 7/15/2014(4) Revised 9/18/2014 Comments from Jim Morrison SLDF
(5) Revised 10/14/2014

EXHIBIT 5

CITY PUBLIC WORKS DEPARTMENT SERVICE LEVEL AGREEMENT FOR THE PROJECT INSTALLED IN THE PROPERTY OR EXPANDED PROPERTY

(a) Each Party agrees to take all necessary precautions to avoid damaging the other Party's fiber facilities, and those of third parties, and to protect such fiber facilities in the same manner as such Party protects its own facilities.

(b) Any damage to the Property caused by SLDF or SLDF-affiliated third parties that results in a loss of service shall be repaired by SLDF, at SLDF's sole cost, within a reasonable time period. Provided that nothing contained herein shall be deemed to release or limit claims that SLDF may have against any third party arising from or related to such damage to facilities.

(c) Any damage to the Property, including conduit or other City infrastructure, by third parties unaffiliated with either Party shall be promptly repaired by the City.

(d) If SLDF or SLDF-affiliated third party damages City Fibers and related facilities or facilities owned by third parties within the Property, SLDF shall immediately notify City and, if the damaged facility is owned or leased by a third party, take reasonable efforts to notify the owner of the damaged facility. If required by City, SLDF shall effect repairs to the damaged facilities within a reasonable time period based on the nature of the damage conditions at the site.

(e) In the event of damages described herein, City may elect to hire a third party contractor to effect repairs to any damaged facility within the Project if, , SLDF notifies the City that it will not or cannot effect repairs within a reasonable time period and, present an invoice to SLDF for all Costs directly incurred for repairs to the damaged facilities, including, but not limited to, staff time costs, traffic control, police services, notification of third parties, and consultant and contractor costs.

(f) For the purposes of these requirements, a "reasonable time period" shall mean that SL Dark Fiber must mobilize personnel to respond to the repair site within four (4) hours after the time of becoming aware of an event requiring Emergency Unscheduled Maintenance of Services and work diligently and continuously until any outage is resolved with restoration of service. This provision shall not be applied if SL Dark Fiber notifies the City of a Force Majeure event.(g) Within thirty (30) days of the First Amendments execution date, SLDF shall provide to City for its review and approval a Protocol Document and Escalation Matrix, outlining procedures to be followed in the event of service loss.

EXHIBIT 6

CONSENT TO ALTER PROPERTY

The Applicant requests a modification to the "Property" as defined in the License Agreement between San Leandro Dark Fiber and the City of San Leandro dated October 17, 2011 (Agreement). The requested modification to the Property is as follows (Summary Description):

The work will be constructed in accordance with the following (in order of precedence):

- Issued City of San Leandro Encroachment Permit
- The approved plans
- General Guidelines for Fiber Conduit Construction (attached)
- Requirements of the Agreement

Applicant:

San Leandro Dark Fiber Contact: _____

303 W. Joaquin Ave., #100 Phone: _____

San Leandro CA 94577 Email: _____

Signed: _____ Date: _____

City Department Review:

E/T By _____ Date _____ PWS By _____ Date _____

IS By _____ Date _____ CIO By _____ Date _____

Comments: _____

() Approved: Signed: _____ Date: _____

The requested work has been approved as a modification to the Property as defined in the Agreement.

Plan Title _____ Dated: _____

Encroachment Permit Number _____ Issued Date _____

Agreement Modification Number _____ Added Conduit Length: _____ feet

() Rejected: Signed: _____ Date: _____

The requested work is not approved for inclusion into the Property as defined in the Agreement.

Comments: _____

EXHIBIT 7

ENGINEERING DEPARTMENT'S STANDARD OPERATING AND CONSTRUCTION PROCEDURES

General Guidelines for Conduit Construction for Fiber Optic Use In the Property or Expanded Property

1. Conduit

a. Conduit material shall be Schedule 40 Polyvinyl Chloride (PVC) or Schedule 26 High Density Polyethylene (HDPE)

b. Single conduits shall have a 2 (two) inch minimum diameter. Conduit shall have a pull rope or tape. A #8 stranded trace wire will be installed in the conduit or other trace wire system approved by the City.

c. Multiple conduits installed as a bundle shall each have a minimum of 1 ¼ inch diameter. Each conduit shall have a pull rope or tape. A single #8 stranded trace wire in one conduit will be installed or other trace wire system approved by the City.

d. To the greatest extent practical, all conduits will be installed by trenchless methods. Open trench construction over 20 feet in length will require specific approval by the City.

e. Minimum installation depths shall be per City Standard Detail 120A.

f. Trenching by rock cutting excavator, "rock wheeling", is not permitted.

2. Pull Boxes

a. Pull Boxes and conduit terminations in boxes shall be per City Standard Detail 502. Pull Boxes shall have nominal inside dimensions of 48 inches by 30 inches 24 inches deep..

b. Pull Boxes will be installed at each end of the conduit installation and at intervals not to exceed 500 feet.

c. Boxes will be marked "Communications"

d. Boxes located in sidewalk area within 5 feet of driveways will be traffic rated.

e. Boxes constructed in the sidewalk area will not be located on or within 5 feet of an intersection curb radius, without approval by the City

3. Manholes

a. Manholes shall be constructed of polymer concrete or similar material with cast iron frame and covers. Structure shall be rated for continuous highway truck loading. Minimum inside

dimensions shall be 36 inches by 60 inches and 36 inches deep. Manhole access shall have a minimum opening of 30 inches.

b. Unless otherwise approved by City, manholes will be constructed at a depth so that the top of the manhole cover without grade rings is at no higher an elevation than twelve (12) inches below the nearest lip of gutter. Appropriate grade rings will be used to raise the manhole frame and cover to the appropriate pavement elevation.

4. Other

a. All work shall be in accordance with the applicable City Standard details or as approved

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