



City of San Leandro

Meeting Date: October 17, 2011

Staff Report

File Number: 11-243

Agenda Section: ACTION ITEMS

Agenda Number: 10.A.

TO: City Council

FROM: Lianne Marshall
Interim City Manager/Executive Director

BY: Luke Sims
Community Development Director

FINANCE REVIEW: Not Applicable

TITLE: Staff Report on a License Agreement with San Leandro Dark Fiber for the
Installation of Fiber Optic Facilities in City Conduit

RECOMMENDATIONS

Staff recommends that the City Council approve the attached resolution authorizing a License Agreement with San Leandro Dark Fiber for the purpose of installing fiber optic facilities within the City's existing conduit.

BACKGROUND

Early in 2011, the City of San Leandro received a proposal from OSIsoft, a local software company, to license an approximately 10-mile loop of City conduit for the purpose of installing fiber optic cable. The loop would be used to provide extremely high-speed data communications for OSIsoft as well as other businesses that opt to tie in to the system. This high speed broadband service has the potential to serve as a business development tool, positioning San Leandro to attract and retain companies that rely on high-speed internet connectivity and large quantities of data.

The License Agreement is an agreement between SL Dark Fiber LLC (a corporation formed by OSIsoft to manage the proposed fiber operation) and the City of San Leandro (City) for the use of City conduit to install a fiber optic loop. Staff has worked over the past several months to negotiate a license agreement with SL Dark Fiber that achieves the following goals:

- Limit any City exposure to financial risk resulting from the project;
- Protect the security of existing City infrastructure and data systems;

- Minimize the regulatory burden on SL Dark Fiber, to the extent possible, to maximize the likelihood of the fiber enterprise being successful;
- Secure some additional dark fiber for City use; and
- Establish fair procedures for the long-term maintenance of the system.

Staff has been working cooperatively with OSIssoft to date to leverage the system's potential as a business development tool. Specifically, staff has provided information regarding current businesses that might benefit from a connection to the loop and made introductions as requested. Additionally, staff has identified potential opportunity sites and will work with OSIssoft in the future to market these sites.

Analysis

The terms of the proposed license agreement were negotiated with the goals of protecting City interests while also laying the groundwork for a successful fiber enterprise. The system itself is not expected to be a substantial revenue generator for the City, but may be an economic engine that will benefit the city from increased development and employment.

The following provides an overview and assessment of some of the key terms in the Agreement.

Term - The initial term is for twenty years, and SL Dark Fiber has the right to renew for four additional five-year terms. Each extension can be exercised as early as 15 years, and no later than 180 days, prior to its commencement.

Analysis: A long-term agreement is crucial to the success of the fiber system because users will need to make a substantial capital investment to connect to the loop.

License Fee - For the first ten years, the fee will be \$1.00 annually. For years 11-20, the fee will be set at market rate unless SL Dark Fiber can demonstrate that it has not yet achieved profitability. Beginning in year 20, the fee will be set a market rate. Market rate is to be determined by mutual consent based on a review of recently negotiated commercial conduit license agreements. The Agreement has a provision for arbitration should the parties be unable to agree on a market rate. Once established, the market rate will be adjusted annually for inflation.

Analysis: Given the substantial upfront investment required by SL Dark Fiber to install the loop and initiate the system, the project is unlikely to generate substantial profits in the near-term. The use of a "market rate" license fee will enable the City to collect license fee revenue should the system become profitable.

City Approval of Sale, Right of First Refusal, and Abandonment - If SL Dark Fiber wishes to sell the system, the City will have right of first refusal to purchase it. If the City does not exercise its right of first refusal, the system can be sold to another party with the City's written consent, which cannot be unreasonably withheld. If SL Dark Fiber abandons the system, the City will take ownership at no cost.

Analysis: These conditions give the City the opportunity to maintain control of the system should SL Dark Fiber become insolvent or decide to sell. Although the City might not necessarily have the resources to acquire and manage the system, the City would have the

opportunity to select a partner and take over operations. If SL Dark Fiber abandons the system, the City will take ownership.

Dedication of Fiber Strands for City Use - The license requires SL Dark Fiber to dedicate 30 strands, or roughly 10 percent of the new fiber system, to the City for its unrestricted use.

Analysis: This contribution will be useful to the City for municipal operations (networking, traffic signals, etc.) and potentially for partnering with other entities such as service providers or the schools. The dedicated fibers might also be used as a backbone for a municipal wireless system although additional investment would be required to make such a system operational. Although connection costs could be substantial, this dedication provides the City significant additional fiber optic capacity.

Project Costs - SL Dark Fiber has the sole responsibility for all project costs, including all design, development, and construction costs. The City will be responsible for its staff, attorney and consultant time and to conduct any studies including any environmental, marketing, financial feasibility, and design studies it deems necessary to assist with the analysis of the project.

Analysis: The City has invested staff and resources to support the project while ensuring that financial risk to the City is minimized.

Maintenance - SL Dark Fiber shall have sole responsibility for the installation, operation, maintenance, security, replacement and repair of the SL Dark Fiber network. When damage is caused by a third party, the City and SL Dark Fiber will share the costs of repair and reimbursement proportionally.

Analysis: These conditions ensure that SL Dark Fiber funds all costs associated with maintenance of its system and repair of any damage caused as a result of the installation and operation of their system. The City will oversee the maintenance and repair of the system as it has an interest in maintaining control over City conduit space which also contains existing City fiber used for communications and traffic signals.

As-Is Conveyance - The City grants the license to SL Dark Fiber for the property in its "as-is" condition, and SL Dark Fiber acknowledges that the City makes no representations or warranties to SL Dark Fiber with regard to the condition of the Property or the fitness or suitability thereof for SL Dark Fiber's purposes.

Analysis: SL Dark Fiber is presently undertaking an analysis to determine if sufficient capacity exists within all portions of the City conduit. Where adequate capacity does not exist, the City will work with SL Dark Fiber to the extent possible to identify alternatives.

Project Schedule - SL Dark Fiber has submitted a construction schedule that assumes the fiber loop installation will take slightly less than three months.

Analysis: The City's consultant believes this schedule is reasonable, assuming no unforeseen hurdles. If issues do arise, a longer construction schedule would not cause any significant negative impacts for the City.

Current Agency Policies

The San Leandro Redevelopment Agency 2010-14 Implementation Plan listed the following as a priority project for all redevelopment project areas:

“Facilitate technology infrastructure enhancements, including but not limited to high-speed internet services, to underserved business districts in order to support business operations and to attract new business to the City.”

Previous Actions

On June 6, 2011 the City Council approved an Exclusive Negotiating Rights Agreement with OSIs, Inc. for the purpose of negotiating a license agreement.

Committee Review and Actions

An update on the status of the license Agreement negotiations was provided to the Business and Housing Development Committee on September 8, 2011.

Permits and/or Variances Granted

In the License Agreement, the City agrees to assist SL Dark Fiber in obtaining any necessary permits or entitlements from the City (including but not limited to encroachment permits and environmental review).

Summary of Public Outreach Efforts

Business Development staff held two public workshops to provide a project update and solicit business community feedback on broadband needs on July 19, 2011 and July 26, 2011. The SL Dark Fiber proposal was presented and discussed at both meetings.

Fiscal Impacts

The City is responsible for its own staff and consulting expenses related to the project. The City Council approved a Consulting Services Agreement with Tellus Venture Associates in June 2011 for a not-to-exceed cost of \$45,000. Although that contract is primarily focused on development of a citywide Broadband Strategy, one task was for assistance negotiating the License Agreement. The Consulting Services Agreement is funded by the Redevelopment Agency (964-82-001-5120).

No additional funding appropriation is expected for this project.

PREPARED BY: Jeff Kay, Business Development Analyst, Community Development Department
Cynthia Battenberg, Business Development Manager, Community Development Department



City of San Leandro

Meeting Date: October 17, 2011

Resolution - Council

File Number: 11-244

Agenda Section: ACTION ITEMS

Agenda Number:

TO: City Council

FROM: Lianne Marshall
Interim City Manager/Executive Director

BY: Luke Sims
Community Development Director

FINANCE REVIEW: Not Applicable

TITLE: Resolution Approving a License Agreement with San Leandro Dark Fiber
for the Installation of Fiber Optic Facilities in City Conduit

WHEREAS, an agreement between the City of San Leandro and San Leandro Dark Fiber, a copy of which is attached, has been presented to this City Council; and

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

WHEREAS, the City Manager has recommended approval of said agreement.

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

That said agreement is hereby approved and execution thereof is hereby authorized.

LICENSE AGREEMENT

THIS LICENSE AGREEMENT (this “**License**”) is entered into effective as of ____ [date] ____, 2011 (“**Effective Date**”) by and between the City of San Leandro, a municipal corporation (“**City**”) and San Leandro Dark Fiber, a limited liability company (“**SL Dark Fiber**”). The City and SL Dark Fiber are sometimes hereinafter referred to individually as “**Party**” and collectively as the “**Parties**.”

RECITALS

- A. The City is the owner of the real property (the “**Property**”) containing City conduit that houses City-owned fiber optic wiring and related facilities, as more particularly described by diagrams and maps in Exhibit A, attached hereto and incorporated herein by reference.
- B. The City has the authority to regulate the terms and conditions for the use of the public right-of-way or service easements within the City’s jurisdiction.
- C. SL Dark Fiber desires to install and operate fiber optic cables and related facilities (the “**Project**”) in the existing conduit or other City infrastructure located on the Property and within the City’s right-of-way, that will be used to support the provision of telecommunications services to existing and future customers in the City.
- D. On June 6, 2011, the Parties entered into an Exclusive Negotiating Rights Agreement allowing City Staff to pursue negotiations and grant SL Dark Fiber with exclusive negotiating rights regarding SL Dark Fiber’s proposed development of the Project.
- E. Prior to execution of this License, SL Dark Fiber has demonstrated that it has sufficient financial resources to fund the Project.
- F. In order to carry out and complete the Project, SL Dark Fiber must have access to the Property and the public right-of-way in exchange for the grant of dark fiber strands to the City.
- G. To this end, the purpose of this License is to grant limited permission to SL Dark Fiber to enter onto and use the Property for the duration of the Project, solely for the purposes of the Project, strictly on the basis stated herein and subject to the terms, conditions and covenants stated herein.

In view of the foregoing recitals and the covenants below, all of which constitute good and valuable consideration, with the intention to be legally bound the Parties agree as follows:

ARTICLE I DEFINITIONS

- 1.1. “Abandonment” is defined in Section 2.6(c).
- 1.2. “Applicable Laws” is defined in Section 5.1.
- 1.3. “City Property” is defined in Section 3.4.

- 1.4. “City Strands” is defined in Section 2.4(b).
- 1.5. “Claims” is defined in Section 10.1.
- 1.6. “Contractors” is defined in Section 3.5.
- 1.7. “Construction Permits” is defined in Section 5.2.
- 1.8. “Effective Date” is defined in the preamble of this Lease.
- 1.9. Reserved.
- 1.10. “Hazardous Materials” is defined in Section 11.3(b).
- 1.11. “Hazardous Materials Claims” is defined in Section 11.1(c).
- 1.12. “Hazardous Materials Laws” is defined in Section 11.3(c).
- 1.13. “Indemnitees” is defined in Section 10.1.
- 1.14. “Initial Term” is defined in Section 2.3.
- 1.15. “License Fee” is defined in Section 2.2.
- 1.16. “Permitted Activity” is defined in Section 2.1.
- 1.17. “Permitted Work” is defined in Section 3.1.
- 1.18. “Property” is defined in Recital A.
- 1.19. “Project” is defined in Recital C.
- 1.20. “Remedial Work” is defined in Section 11.3(a).
- 1.21. “Required Insurance” is defined in Section 9.1.
- 1.22. “Scope of Work” is defined in Section 3.1.
- 1.23. “Reserved
- 1.24. “SL Dark Fiber Studies” is defined in Section 2.9.

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

2.1. Grant of License; No Leasehold of Property Rights Created. The City hereby grants to SL Dark Fiber a non-exclusive, non-revocable License to enter onto, have access and use the Property, for the sole purpose of installing and operating a fiber optic cable of not more

than a two hundred eighty-eight (288) strand capacity (unless otherwise mutually agreed upon by the Parties in writing) and related facilities in the existing conduit or other City infrastructure located on the Property or within the City's right-of-way in order to support the provision of telecommunications services in the City. This License is not intended to nor shall it be interpreted to create or vest in SL Dark Fiber any leasehold, easement or any other property rights or interests in the Property or any part thereof.

2.2. License Fee. On or before the first day of Years 1 through 10 of the Initial Term of this License, SL Dark Fiber shall pay to the City a fee (the "**License Fee**") in the amount of one dollar (\$1.00) per year for the use of the Property. Such fee is not a revenue sharing arrangement for the telecommunications services to be provided using the Property.

(a) Interest. Any amount due from SL Dark Fiber to the City which 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 License.

(b) License Fee Review and Increase. Commencing in Year 11 of this License and for every subsequent year in the Initial Term, SL Dark Fiber shall provide sufficient information to the City to document that SL Dark Fiber's operation of the Project has generated for SL Dark Fiber or any partners, affiliates, subsidiaries, or any majority shareholding entity of SL Dark Fiber no net profit or else SL Dark Fiber shall pay an increased License Fee equal to the market rate for conduit at that time, as defined in Section 2.2(c). This increased License Fee shall then be payable for the remainder of the Initial Term with an annual adjustment for inflation.

(c) Market Rate. Market rate shall be determined by mutual agreement of the Parties based on ten recently negotiated commercial conduit licensing agreements. If the Parties are unable to agree, then they shall submit to formal mediation with a jointly agreed upon mediator. If mediation is unsuccessful, then the parties shall submit to binding arbitration under the rules of the American Arbitration Association and the decision of the arbitrator(s) shall be enforceable in any court having jurisdiction thereof. Arbitration shall occur only in Alameda County, CA. In the event any dispute is arbitrated, the prevailing Party (as determined by the arbitrator(s)) shall be entitled to recover that Party's reasonable attorney's fees incurred (as determined by the arbitrator(s)).

2.3. Initial Term. This License shall commence on the date first signed by the Parties and shall have an **Initial Term** of twenty (20) years.

(a) Renewal Right; License Fee During Renewal Term. SL Dark Fiber shall have the right to renew the lease for four (4) additional five (5) year terms, immediately following the Initial Term ("**Renewal Terms**"). The License Fee payable during each of the Renewal Terms shall be the market rate for conduit as determined on the first (1st) year of that

Renewal Term, and shall adjust for inflation each subsequent year of that Renewal Term. All other terms and conditions of this License shall apply during any Renewal Term. In order to exercise the Renewal Right for a Renewal Term, SL Dark Fiber shall send written notification to the City as early as fifteen (15) years prior to the commencement of, and no later than one hundred and eighty (180) calendar days prior to, the expiration of the then-effective term (Initial or Renewal).

2.4. Third Party Access to, and City Ownership of the Fiber Contained in the Project.

(a) The City hereby agrees that SL Dark Fiber may enter into agreements with affiliates or third parties to provide telecommunications services using the portion of the Project SL Dark Fiber owns.

(b) In addition to any fiber optic cable and related facilities provided to the City by SL Dark Fiber under this License and upon Project completion, SL Dark Fiber agrees to convey to the City the ownership and exclusive use of thirty (30) strands of the dark fiber (“**City Strands**”) installed for the Project in any area of conduit where there is sufficient capacity for SL Dark Fiber to install a 288-strand fiber cable. If space constraints limit SL Dark Fiber to install fewer than 288 strands of fiber, then the City shall have ownership and exclusive use of ten (10) percent of the number of fiber strands installed. The Parties agree that there are no restrictions on the City’s use of the City Strands.

2.5. City Approval of Sale or Transfer; City Right of First Refusal.

(a) If at any time during the Initial or Renewal Terms of this License, SL Dark Fiber wishes to sell, transfer or otherwise dispose of the Project, or enough of a portion of the Project to result in a change of control, SL Dark Fiber must 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 such fiber optic cable and/or associated facilities. 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 fiber optic cable and associated facilities, it acknowledges and agrees that it will assume and continue to provide facilities to support any unexpired customer(s) or Project

(c) Agreement(s) for telecommunications services provided on SL Dark Fiber’s facilities through any affiliate or agreements with third parties using SL Dark Fiber’s facilities to provide telecommunications services using facilities in the Project , 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 term of such agreement and any prior exercised contracted extensions and only if such agreement was 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 to exercise its Option and Right of First Refusal, 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 agrees and acknowledges 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.

2.6. Termination, Abandonment or Expiration of License or Project.

(a) This License may be terminated at any time by mutual agreement of the Parties.

(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 Sections 2.8 and 2.9 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 2.6(a). If SL Dark Fiber terminates this License prior to any portion of the Project becoming operational (*i.e.*, the Project is capable of supporting telecommunications services), then ownership of any fiber optic cable or associated facilities already installed will transfer to the City.

(c) After the first five (5) years of the Initial Term, the City shall have the right to terminate this License in the event that SL Dark Fiber abandons the Project 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 Project. Periods of disuse due to force majeure events (defined above), or other events causing the Project 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 License (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, the City will not be bound to any agreements between SL Dark Fiber and third parties or affiliates.

(e) Ownership of the Project Upon Termination or Abandonment. Upon termination or expiration of this License, or abandonment of the Project ownership of the Project 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 License 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 License 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 and such access will not constitute a reduction in capacity of conduit specified for use by SL Dark Fiber.

2.7. Nonexclusive License. SL Dark Fiber understands that this License does not provide SL Dark Fiber exclusive use of the Property and that the City shall have the right to permit other providers of communications or other entities to install equipment or devices in or on the 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 Property that materially affects SL Dark Fiber's ability to use the Property for the Project, including reducing the capacity of conduit specified for use by SL Dark Fiber, or that materially interferes with or degrades the services provided by SL Dark Fiber.

2.8. 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. 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 its condition 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 2.8 shall survive the expiration or earlier termination of this License.

2.9. AS-IS Conveyance. The City hereby grants this License to SL Dark Fiber for the Property in its "as-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 or warranties to SL Dark Fiber with regard to the condition of the 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)), 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 Project. SL Dark Fiber shall rely solely on its own independent investigation and judgment as to all matters relating to the Property and the suitability of the 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 Property and that SL Dark Fiber, by execution hereof, accepts the Property in its current "as-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 existing City fiber optic cable 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.

2.10. 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 commits to fund the Project.

2.11. Annual Reporting. Together with any applicable License Fee, SL Dark Fiber shall send to the City a confidential written annual report detailing information regarding the number of subscribers, capacity used, capacity available, and revenue received from the Project. Such report is designated a SL Dark Fiber trade secret exempt from disclosure under the California Public Records Act.

ARTICLE III

SCOPE OF WORK; PERFORMANCE OF WORK; DEVELOPMENT SCHEDULE

3.1. Scope of Work. Pursuant to this License, the City authorizes SL Dark Fiber to install the Project in the existing conduit of the Property (hereinafter "**Permitted Work**") as described in the "**Scope of Work**," attached as Exhibit B 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.

3.2. Development Schedule. SL Dark Fiber shall make all efforts to comply with the Development Schedule, attached as Exhibit C and incorporated herein by this reference, which includes a schedule describing the anticipated dates by which SL Dark Fiber shall obtain entitlements, commence construction, and complete the Project. The City shall assist SL Dark Fiber in obtaining any necessary permits or entitlements from the City (including but not limited to encroachment permits and environmental review). The City acknowledges and agrees that the schedule set forth in Exhibit C is a best estimate by SL Dark Fiber and that any failure or inability to meet the deadlines set forth in Exhibit C shall not constitute a material breach or

grounds for termination of this License, unless SL Dark Fiber abandons the Project for one hundred twenty (120) days.

3.3. Workmanlike Standard. The Permitted Work shall be performed in a good and workmanlike manner consistent with the standard of care and level of skill presently maintained by the practice of professionals in this locale; in compliance with all federal, state and local laws, ordinances, rules and regulations, in a manner so as not to disturb the occupancy, business or quiet enjoyment of any other tenants or licensees of the Property; and in a manner so as to avoid harm to person(s) or the Property.

3.4. Damage to City Property During Construction and Installation of the Project. Precautions must be taken by SL Dark Fiber to avoid interference with or damage to the City's real and personal property. SL Dark Fiber's equipment must not damage wire lines at, over or near the Property, as well as any other utilities or structures located thereon. SL Dark Fiber shall be liable for any damage to the Property, or any other property of the City or the City right-of-way (all of the foregoing, collectively, "**City Property**") that occurs as a result of this License and the use of the Property, unless caused by the gross negligence or willful misconduct of the City or its employees, agents or contractors. Any waste generated in the process of completing the Permitted Work will be the responsibility of SL Dark Fiber, at SL Dark Fiber's sole cost and expense.

3.5. Subcontractors. SL Dark Fiber shall be responsible for all Contractors and all subcontractors engaged to complete the Permitted Work ("**Contractors**"), including, without limitation, responsibility for the payment of any compensation or other amounts payable to Contractors, and shall be responsible for their conduct and the conduct of their employees, agents and volunteers. SL Dark Fiber shall direct the Permitted Work rendered or performed by Contractors using SL Dark Fiber's skill and attention, shall require discipline and good order among its employees and subcontractors, and shall not knowingly employ or engage, on the job, any person unfit or unskilled for the task assigned to him or her. All Contractors and subcontractors shall be properly licensed and insured to complete work within the public right-of-way.

3.6. Materials and Supplies. SL Dark Fiber shall, at SL Dark Fiber's own cost and expense, furnish (unless herein otherwise specifically provided) all superintendence, labor, tools, equipment, materials, and supplies and all other things requisite and necessary to perform the Permitted Work under this License.

3.7. Supervision by SL Dark Fiber. SL Dark Fiber shall be responsible for the direction of the Permitted Work, be responsible for all methods, sequences and procedures used in connection with the Permitted Work, and be responsible for coordinating all portions of the Permitted Work. All persons entering the work zone pursuant to this License shall wear safety glasses with side shields, hard hats and steel-toed safety shoes, and shall abide by CAL-OSHA rules and regulations.

3.8. Independent Contractor. SL Dark Fiber and the agents and employees of SL Dark Fiber are not employees of the City. SL Dark Fiber is acting as an independent contractor and nothing herein contained shall be construed inconsistent with that status.

ARTICLE IV ECONOMIC BENEFITS; CONFORMANCE WITH GENERAL PLAN

4.1. Economic Benefits of Project. Exhibit D, attached hereto and incorporated herein by reference, confirms that the Project is consistent with the City's Economic Development Plan and General Plan.

4.2. Addition of Other Businesses to Project. Exhibit E of this License identifies third parties that SL Dark Fiber may contract with to provide telecommunications services using facilities that are included in the Project, and describes how SL Dark Fiber proposes to allow businesses or other entities access to 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.

ARTICLE V COMPLIANCE WITH LAW; PERMITS AND APPROVALS; LIENS AND ENCUMBRANCES

5.1. Compliance With Law. In completing the Permitted Work, SL Dark Fiber shall comply, and shall require Contractors to comply with all applicable federal, state and local laws, statutes, ordinances, codes, rules, regulations, orders, judgments and decrees (collectively, "**Applicable Laws**").

5.2. Permits. SL Dark Fiber shall obtain all necessary permits and authorizations required by Applicable Laws. Prior to commencing the Permitted Work, SL Dark Fiber shall apply for and obtain, or cause to be applied for and obtained, from the City all necessary separate authorizations by the City, apart from this License, required by the City's Municipal Code and any other City rules and regulations, including encroachment permits, building permits and any other City permits (collectively "**Construction Permits**") from the City. The City shall assist SL Dark Fiber in obtaining all such permits. SL Dark Fiber shall comply with all generally applicable City requirements for the issuance of Construction Permits, such as the payment of standard fees, the submission of plans, installation plans, and traffic control plans. If SL Dark Fiber commences the Permitted Work without meeting such requirements, the City shall notify SL Dark Fiber of such deficiency and give SL Dark Fiber a reasonable period to cure such deficiency. If SL Dark Fiber does not cure such deficiency within sixty (60) days, then the City may, at its option, immediately remove any or all non-conforming equipment. Any removals of such equipment pursuant to this Section shall be at the risk of SL Dark Fiber and any such removed equipment shall be stored only for sixty (60) days by the City and disposed of thereafter in a manner to be determined solely by the City. SL Dark Fiber shall reimburse the City for all costs of removal and storage incurred, within thirty (30) days of receipt of an invoice detailing the same.

5.3. Liens and Encumbrances. SL Dark Fiber shall at all times keep the Property free and clear of all liens and encumbrances (including mechanic's liens) affecting title to the Property or arising from any act or omission of SL Dark Fiber or those claiming under SL Dark Fiber. The provisions of this Section 5.3 shall survive the expiration or earlier termination of this License. SL Dark Fiber shall pay as due all undisputed claims for work done, and for services

rendered or material furnished to the City Facilities as part of the Project, at the City's request. If SL Dark Fiber fails to pay any undisputed claims or to discharge any undisputed liens, the City may do so and collect all costs of discharge, including its reasonable attorneys' fees. Payment or discharge by the City shall not constitute a waiver of any right or remedy the City may have on account of SL Dark Fiber's default. SL Dark Fiber may withhold payment of any claim in connection with a good faith dispute over the obligation to pay, so long as the City's property interests are not jeopardized. If a lien is filed as a result of nonpayment, SL Dark Fiber shall within ten (10) business days after knowledge of filing of the lien, provide the City with an executed copy of a discharge of the lien, or deposit with the City cash or a sufficient corporate surety bond or other security satisfactory to the City in an amount sufficient to discharge the lien plus any costs, attorney fees or other charges that could accrue as a result of any foreclosure sale or sale under the lien. This License shall be subject and subordinate to any liens and encumbrances as are now on or as the City may hereafter impose on City Property, and SL Dark Fiber shall upon request of the City, execute and deliver agreements of subordination consistent with this Section.

ARTICLE VI REPRESENTATIONS

SL Dark Fiber represents and warrants to the City as follows:

6.1. Facilities and Experience. SL Dark Fiber is able to cause the performance of the Permitted Work and has the knowledge, experience and competence to do so.

6.2. Solvent. SL Dark Fiber is financially solvent, able to pay its debts as they mature and is possessed of sufficient working capital to cause the performance of the Scope of Work and meet their obligations under this License.

6.3. Authority. SL Dark Fiber is authorized to do business in California, the County of Alameda and the City, and is properly qualified, certified and licensed to cause the performance of the Permitted Work by all necessary governmental and quasi-governmental authorities having jurisdiction over SL Dark Fiber.

6.4. Execution. SL Dark Fiber's execution of this License and performance of it is within its duly authorized powers, and neither SL Dark Fiber, nor its respective employees, agents or subcontractors are subject to any restrictive obligations imposed by any third party which would impair SL Dark Fiber's ability to cause the performance of the Permitted Work, or which would prevent SL Dark Fiber from complying fully with the requirements of this License.

ARTICLE VII COSTS

7.1. Project Costs. SL Dark Fiber has the sole responsibility for all Project costs, including without limitation all design, development, and construction costs and the cost of all improvements, if any. SL Dark Fiber shall submit design and construction drawings and plans in conformance with the Development Schedule attached as Exhibit C. Except as otherwise expressly provided herein, SL Dark Fiber shall pay all of its own costs and expenses incurred in connection with this License and the activities contemplated hereby. SL Dark Fiber shall be

responsible for any environmental studies required by the California Environmental Quality Act (“CEQA”), including an Environmental Impact Report should one become necessary, that is required for the approval of this License or other agreements pertaining to the Project.

7.2. City Responsible for its Own Expenses. The City will be responsible for its costs (including staff, attorney and consultant time) and expenses to permit SL Dark Fiber to access the Property and to conduct any studies including without limitation any environmental, marketing, financial feasibility, and design studies it deems necessary to assist it with the analysis of the Project.

ARTICLE VIII MAINTENANCE; REPAIRS

8.1 Obligation to Repair, Maintain and Secure the Project. SL Dark Fiber shall have sole responsibility for the installation, operation, maintenance, security, replacement and repair of the Project and, the City shall have sole responsibility for the routine inspection, maintenance, repair, and security of the Property, including all conduit, vaults and other City infrastructure. Repair obligations in the event of damage caused by a third party is set forth in section 8.7 below. In the event of damage to City Property, including but not limited to City conduit, caused by SL Dark Fiber or its Contractor related to SL Dark Fiber’s work to install or to repair the Project, including but not limited to theft or damage to City Infrastructure, SL Dark Fiber shall be responsible for repair and restoration of the City’s Property and conduit. Both Parties agree and acknowledge that time is of the essence for repair of the Property used for the Project that is in use to provide telecommunications services. SL Dark Fiber shall be responsible for replacement or repair of its fiber optic cable and related facilities. 8.2 Secure and Safe Condition and Good Repair. SL Dark Fiber shall keep the Project and the City Property free of debris and anything of a dangerous, noxious or offensive nature or which would create a hazard or undue vibration, heat, noise or interference. SL Dark Fiber shall, at its own expense, maintain the Project in (i) a safe condition, in good repair; (ii) in a manner reasonably satisfactory to the City so as not to conflict with the use of or other leasing of the Property by the City; and (iii) in conformity with such requirements and specifications as the City may require at the time of installation and thereafter in compliance with all federal and state applicable laws and regulations of general applicability, including but not limited to the National Electrical Safety Code. SL Dark Fiber shall not interfere with the City or other tenant’s use of the City Property, related facilities or other equipment on the City Property. SL Dark Fiber shall secure the Project at all times to prevent access and theft of the Project. The City shall secure the Property, including any City infrastructure or conduit, to prevent access, damage or theft of the Project and SL Dark Fiber shall cooperate with such efforts.

8.3 City’s Rights with Regard to Maintenance. SL Dark Fiber recognizes the City must have the right to take any reasonable action that it deems necessary, in its sole discretion, to repair, maintain, alter, or improve the Property and provision of electrical power thereon to protect the public health and safety of its citizens, including users of the Property. The City acknowledges and agrees that, to the extent feasible, any such action shall not damage, interfere with or degrade the telecommunications services or facilities provided by SL Dark Fiber, its affiliates or designated third parties. Other than emergency repairs, the City shall have no duty to make repairs to the Property used by the Project until SL Dark Fiber has given written notice

to the City of the repairs to be made or the condition to be corrected. The City shall have no liability for failure to make any repair required of it if the repair is completed within a reasonable time following the notice from SL Dark Fiber. The City agrees that it will take all reasonable steps to prevent damage such as cable cuts to the Project by ensuring that all such property is marked or otherwise identified in City records to prevent accidental damage, by requiring any entity (including City personnel or contractors) to consult such markings or records prior to undertaking any ground disturbing activities, and by including a condition on all excavation permits that requires the applicant to pay for any damage to the City's Property and all SL Dark Fiber property located thereon. The City agrees to seek reimbursement for such repair and restoration from the entity that caused the damage, but that such repair and restoration shall not be delayed pending such reimbursement.

8.4 Mutual Cooperation. The City agrees to cooperate with SL Dark Fiber, in a reasonable and non-discriminatory manner, in obtaining, at SL Dark Fiber's expense (including reimbursement of the City's reasonable attorney and administrative fees), any City or federal licenses and permits required for or substantially required by SL Dark Fiber's use of the City Property. SL Dark Fiber shall use reasonable care during the installation of its fiber cable, and after installation shall test to verify that SL Dark Fiber's fiber optic facilities do not cause interference or loss of signal of any City owned or operated communications services.

8.5 Relocation at City's Request. SL Dark Fiber understands and acknowledges that the City may occasionally require SL Dark Fiber to relocate or remove the Project, at SL Dark Fiber's sole cost and expense, whenever the City reasonably determines that the relocation or removal is needed to address an emergency situation that puts at risk the public health or welfare. If the City desires for SL Dark Fiber to relocate facilities for any of the following non-emergency purposes: (a) to facilitate the construction, completion, repair, relocation, or maintenance of a City facility or project; (b) to prevent interference with the proper operation of City-owned light poles, traffic signal poles, or other City facilities or services, the City shall give SL Dark Fiber thirty (30) days notice and shall afford SL Dark Fiber a reasonably equivalent alternate location for the same License Fee. The City and SL Dark Fiber shall mutually agree in writing who shall bear the costs for such non-emergency moves. If, after agreement on payment of costs is reached, SL Dark Fiber fails to relocate or remove any of its facilities as requested by the City within a reasonable period that enables SL Dark Fiber to avoid disruption of service to its customers, the City shall be entitled to relocate or remove the same at the sole cost and expense of SL Dark Fiber, with notice to SL Dark Fiber. In such event the City shall not be responsible for damage, but shall use reasonable care to preserve such removed equipment or facility until retrieved by SL Dark Fiber.

8.6 Alterations; Improvements. SL Dark Fiber shall not make or allow to be made any alterations, additions or improvements to any of the Property or any part thereof without first obtaining the written consent of the City. If the City provides such consent, all alterations, additions or improvements shall be made at the sole expense of SL Dark Fiber. SL Dark Fiber may update or replace the Project from time to time with prior written notice to the City, provided that (i) the replacement has been previously approved in writing by the City in this License or otherwise; (ii) the replacement is no heavier or larger and uses no more electrical power, or creates no greater health, safety, or visual impact than the model it is replacing; (iii) the electrical power consumption, size and weight of the updated equipment does not, in the

reasonable judgment of the City, place an undue burden on or risk of damage or injury to the Property, the City facilities thereon, or persons working on or affected by the City facilities; and (iv) any change in their location on the Property is approved in writing. SL Dark Fiber shall submit to the City a detailed proposal for any replacement to its equipment in the Property and any supplemental materials, as may be requested. No equipment upgrade or replacement within the Property may be undertaken without written approval of the City prior to the installation.

8.7 Repairs, Damages and Notification. Any damage done to Property by SL Dark Fiber, its agents or contractors, during construction, installation, repairs, maintenance, replacement, relocation and/or during operations shall be repaired or replaced immediately at SL Dark Fiber's sole cost and expense and to the City's sole satisfaction. Except in case of emergency, SL Dark Fiber shall notify the City in advance in writing and obtain approval of SL Dark Fiber's proposed construction, maintenance or repair activities to be performed on the Property in order to coordinate those activities with the City's operations. The City's approval of any construction, maintenance, and repair activities under this subparagraph shall not be unreasonably withheld. In cases of emergency, any construction, maintenance, and repair work performed without written notification to the City shall be limited to the work necessary to eliminate the emergency or otherwise protect the public health and safety, and SL Dark Fiber shall notify the City as soon as possible of the emergency and any work performed to eliminate it or protect the public health and safety. Any damage to the Property, including conduit or other City infrastructure by third parties unaffiliated with either Party shall be promptly repaired by City. Both Parties agree and acknowledge that time is of the essence for repair of the Property used for the Project that is in use to provide telecommunications services. If the Project is damaged, SL Dark Fiber will make all necessary repairs. The City shall take all reasonable and necessary actions to recover the damages caused by the third party to the Property or the Project, including but not limited to any legal action. If both the Property and the Project are damaged, SL Dark Fiber and City agree to split the costs incurred by City to recover all damages from the responsible third party in proportion to the cost of damage. For example, if the cost to repair the Property is three times the cost to repair the Project, then the City shall pay for three quarters of the total cost and SL Dark Fiber shall pay for one quarter. SL Dark Fiber shall have the right at its own expense to have counsel participate in any such legal action.

ARTICLE IX INSURANCE

9.1. Types of Insurance Required. Prior to commencing any activities under the Scope of Work, SL Dark Fiber shall procure, or cause to be procured, and keep in full force and effect during the life of this License, at SL Dark Fiber's sole cost and expense, all of the following types of insurance:

<u>Type of Insurance Policy</u>	<u>Limits</u>
Commercial general liability policy, combined single limit	\$2,000,000
Contractual liability coverage	
Comprehensive automobile liability coverage	\$2,000,000
Worker's compensation	Statutory

For purposes of this License, the foregoing insurance shall be referred to herein as “**Required Insurance.**”

9.2. Qualifications of Insurers and Deductibles. All of the Required Insurance shall be issued by an admitted insurer or insurers as defined by the California Insurance Code with a Bests’ rating of no less than A:VII. The deductibles under each of the policies issued for the Required Insurance shall be reasonable in amount and in no event shall exceed the sum of Ten Thousand Dollars (\$10,000.00) under each such policy.

9.3. Additional Insured; Form of Endorsement. All policies for Required Insurance will be required to name the City and its respective directors, officers, employees, agents and representatives as additional insureds by way of an endorsement. Prior to the Effective Date, SL Dark Fiber shall furnish the City with certificates of insurance in a form acceptable to the City evidencing the Required Insurance coverage and duly executed endorsements evidencing such additional insured status.

9.4. Cancellation Provisions. All of the Required Insurance shall provide (by way of endorsement or otherwise) that no cancellation, expiration, reduction or modification in such Required Insurance can occur or be implemented without first notifying the City with at least thirty (30) days prior written notice.

9.5. Primary Insurance Endorsement. All Required Insurance shall contain an endorsement providing that such insurance is primary and that any insurance maintained by the City is noncontributory with the Required Insurance. All Required Insurance shall also contain language to the effect that any loss shall be payable notwithstanding or negligence of the City that might otherwise result in the forfeiture of the Required Insurance. Waiver of Subrogation. All Required Insurance shall also contain an endorsement providing for a waiver of subrogation against the City by SL Dark Fiber.

9.6. Worker’s Compensation. This policy or policies shall cover the entire liability of Contractor to employees as determined by California law. The policy shall contain a waiver of subrogation against the City.

9.7. Comprehensive General Liability. General Liability Insurance must be Two Million Dollars (\$2,000,000.00) combined single limit per event and annual aggregate for bodily injury and property damage liability arising out of the Permitted Work to be performed under this License.

9.8. Certificates of Insurance. Prior to the commencement of the Services, SL Dark Fiber shall provide to the City certificates of insurance evidencing the obtaining of the Required Insurance as provided in this Article.

ARTICLE X INDEMNITY

10.1. Indemnity. To the fullest extent allowed by law, SL Dark Fiber shall defend, with counsel reasonably acceptable to the City, indemnify and hold harmless the City, its agents, officers and employees (the “**Indemnitees**”) from and against any and all present and future

liabilities, losses, damages, fines, deficiencies, penalties, claims, demands, suits, actions, causes of action, legal or administrative proceedings, judgments, costs and expenses (including without limitation reasonable attorneys' fees and court costs) (all of the foregoing, collectively "**Claims**") which directly or indirectly, in whole or in part, are caused by, arise in connection with, result from, or are alleged to be caused by this License or SL Dark Fiber's (or its agents, employees, consultants, contractors or subcontractors) failure to comply with all applicable state and federal laws and regulations relating to the construction of the Project, including without limitation, all applicable federal and state labor laws and standards, or in any other manner arising from or relating to the design, development, construction, or the operation or maintenance of the Project, whether such Claim shall be discovered before or after termination of this License. SL Dark Fiber shall not be required to indemnify the City for any Claim caused in whole or in part by the gross negligence or willful misconduct of the City (including its employees, agents and consultants). At its sole discretion, SL Dark Fiber may participate at its own expense in the defense of any claim, action or proceeding, but such participation shall not relieve SL Dark Fiber of any obligation imposed by this License. SL Dark Fiber shall notify the City promptly of any Claims and cooperate fully in its defense. It is further agreed that the City does not and shall not waive any rights against SL Dark Fiber which it may have by reason of this Section because of the acceptance by the City of SL Dark Fiber's deposit with City of any of the insurance policies described in this License. The provisions of this Section 10.1 shall survive the expiration or earlier termination of this License.

10.2. Release of Claims. SL Dark Fiber hereby waives, releases, and discharges forever the Indemnitees from all present and future Claims arising out of or in any way connected with entry upon or use of City Property by Licensee or Licensee's agents, employees, contractors or subcontractors, including without limitation all Claims arising in connection with any injury to persons or damage to or theft of vehicles, equipment, materials, or any other personal property, except and to the extent caused solely by the gross negligence or willful misconduct of any of the Indemnitees. The provisions of this Section shall survive the expiration or earlier termination of this License.

ARTICLE XI ENVIRONMENTAL MATTERS

11.1. The City covenants that to the best of its knowledge, there are no Hazardous Materials present in, on or under the Property. Based on this covenant, SL Dark Fiber hereby covenants and agrees that throughout the Initial Term:

(a) The Project, and the use and operation thereof, shall be in compliance with all Hazardous Materials Laws, and SL Dark Fiber shall not cause or permit the Property or any portion thereof to be in violation of any Hazardous Materials Laws, as defined below.

(b) SL Dark Fiber shall not permit the Property or any portion thereof to be a site for the use, generation, treatment, manufacture, storage, disposal or transportation of Hazardous Materials, as defined below, nor shall SL Dark Fiber permit the presence or release of Hazardous Materials in, on, under, about or from the Property with the exception of materials customarily used in construction, operation, use or maintenance of facilities, provided such materials are used, stored and disposed of in compliance with Hazardous Materials Laws.

(c) Upon receiving knowledge of the same, SL Dark Fiber shall immediately advise the City in writing of: (i) any and all enforcement, clean-up, removal or other governmental or regulatory actions instituted, completed or threatened against SL Dark Fiber or the Property pursuant to any applicable Hazardous Materials Laws; (ii) any and all complaints, claims, citations, demands, inquiries, reports, or notices made or threatened by any third party against SL Dark Fiber relating to damage, contribution, cost recovery, compensation, loss or injury resulting from any Hazardous Materials; (iii) the presence or release of any Hazardous Materials in, on, under, about or from the Property; or (iv) SL Dark Fiber's discovery of any occurrence or condition on any real property adjoining or in the vicinity of the Property classified as "Border Zone Property" under the provisions of California Health and Safety Code, Sections 25220 *et seq.*, or any regulation adopted in connection therewith, that may in any way affect the Property pursuant to any Hazardous Materials Laws or cause it or any part thereof to be designated as Border Zone Property. The matters set forth in the foregoing clauses (i) through (iv) are hereinafter referred to as "**Hazardous Materials Claims.**" The City shall have the right at its own expense to join and participate in, as a party if it so elects, any legal proceedings or actions initiated in connection with any Hazardous Materials Claim.

(d) If the presence of any Hazardous Material on the Property results in any contamination of the Property in violation of Hazardous Materials Laws, except to the extent such contamination is caused by the City, its employees, agents or contractors, SL Dark Fiber shall promptly take all actions at its sole expense as are necessary to remediate the Property as required by law; provided that the City's approval of such actions shall first be obtained, which approval may be withheld in the City's reasonable discretion. All costs and expenses of any Remedial Work shall be paid by SL Dark Fiber, it being understood that the City shall incur no cost, expense or liability in connection with any Remedial Work. The City shall have the right, but no obligation, to join and participate in, as a party if it so elects at the City's cost, any legal proceedings or actions initiated in connection with any Hazardous Material Claims.

11.2. Release of Claims. SL Dark Fiber hereby waives, releases and discharges forever Indemnitees from all present and future Claims SL Dark Fiber may have arising directly or indirectly from the presence or alleged presence of Hazardous Materials on, under, in or about the Property; provided however, this release excludes and shall not apply to (i) any Hazardous Material that originates from any City-owned property other than the Property and which migrates onto the Property after the Effective Date, or (ii) any Hazardous Materials that are generated or caused by the Indemnitees' acts or omissions after the Effective Date.

SL Dark Fiber is aware of and familiar with the provisions of Section 1542 of the California Civil Code which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

As such relates to this Section 11.2, SL Dark Fiber hereby waives and relinquishes all rights and benefits which it may have under Section 1542 of the California Civil Code.

SL Dark Fiber Initials

11.3. Environmental Indemnity. Subject to Sections 11.1 and 11.2 above, SL Dark Fiber shall indemnify, defend (with counsel reasonably acceptable to the City) and hold Indemnitees harmless from and against all Claims arising during the Term of this License and resulting, arising, or based directly or indirectly in whole or in part, upon (i) the presence, release, use, generation, discharge, transport, storage or disposal of any Hazardous Materials on, under, in or about, or the transportation of any such Hazardous Materials to or from, the Property during the Term of this License, (ii) the failure of SL Dark Fiber, SL Dark Fiber's employees, agents, contractors, subcontractors, licensees, permittees, or any person acting on behalf of any of the foregoing to comply with Hazardous Materials Laws, or (iii) the breach by SL Dark Fiber of any of its covenants contained in this Article 11. The foregoing indemnity shall further apply to any residual contamination in, on, under or about the Property or affecting any natural resources, and to any contamination of any property or natural resources arising in connection with the generation, use, handling, treatment, storage, transport or disposal of any such Hazardous Materials, and irrespective of whether any of such activities were or will be undertaken in accordance with Hazardous Materials Laws and shall include, without limitation, Claims arising in connection with any investigation of site conditions or any clean-up, remedial, removal or restoration work ordered by a court or required by any federal, state, or local governmental city or political subdivision. It is further agreed that the City does not and shall not waive any rights against SL Dark Fiber which it may have by reason of this Section because of the acceptance by the City, of SL Dark Fiber's deposit with the City of any of the insurance policies described in this License. This Section 11.3 shall survive the expiration or earlier termination of this License.

(a) Remedial Work. For purposes of this License, "**Remedial Work**" means all investigation, testing, analysis, monitoring, restoration, abatement, detoxification, containment, handling, treatment, removal, storage, decontamination, clean-up, transport, disposal or other ameliorative work or response action required by (i) any Hazardous Materials Laws, (ii) any order or request of any federal, state or local governmental city, or (iii) any judgment, consent decree, settlement or compromise with respect to any and all enforcement, clean-up, removal, remedial or other governmental or regulatory actions or agreements or orders threatened, instituted, or completed pursuant to any Hazardous Materials Laws or any actions, proceedings or claims by such entities or third parties relating to or arising out of the breach of any Hazardous Materials Laws or the presence or release of any Hazardous Material in, on, under or from the Property.

(b) Hazardous Materials. As used herein, "**Hazardous Materials**" means any substance, material, or waste which is or becomes regulated by any local, state or federal authority, city or governmental body, including any material or substance which is: (i) defined as a "hazardous waste," "extremely hazardous waste," or "restricted hazardous waste" under Sections 25115, 25117 or 25122.7, or listed pursuant to Section 25140 of the California Health and Safety Code, Division 20, Chapter 6.5 (Hazardous Waste Control Law); (ii) defined as a "hazardous substance" under Section 25316 of the California Health and Safety Code, Division 20, Chapter 6.8 (Carpenter-Presley-Tanner Hazardous Substance Account Act); (iii) defined as a "hazardous material," "hazardous substance," or "hazardous waste" under Section 25501 of the

California Health and Safety Code, Division 20, Chapter 6.95 (Hazardous Materials Release Response Plans and Inventory); (iv) defined as a “hazardous substance” under Section 25281 of the California Health and Safety Code, Division 20, Chapter 6.7 (Underground Storage of Hazardous Substances); (v) petroleum; (vi) friable asbestos; (vii) polychlorinated biphenyls; (viii) listed under Article 9 or defined as “hazardous” or “extremely hazardous” pursuant to Article 11 of Title 22 of the California Administrative Code, Division 4, Chapter 20; (ix) designated as “hazardous substances” pursuant to Section 311 of the Clean Water Act (33 U.S.C. §1317); (x) defined as a “hazardous waste” pursuant to Section 1004 of the Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.* (42 U.S.C. §6903); or (xi) defined as “hazardous substances” pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601, *et seq.*, as the foregoing statutes and regulations now exist or may hereafter be amended.

(c) Hazardous Materials Laws. As used herein “**Hazardous Materials Laws**” means all federal, state and local laws, ordinances, regulations, orders and directives pertaining to Hazardous Materials, including without limitation, the laws, statutes and regulations cited in the preceding Section 11.3(b), as any of the foregoing may be amended from time to time.

ARTICLE XII MISCELLANEOUS

12.1. Notices. Except as otherwise specified in this License, all notices to be sent pursuant to this License shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other parties in accordance with this Section. All such notices shall be sent by:

- (i) personal delivery, in which case notice is effective upon delivery;
- (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt;
- (iii) nationally recognized overnight courier, with charges prepaid or charged to the sender’s account, in which case notice is effective on delivery if delivery is confirmed by the delivery service; or
- (iv) facsimile transmission, in which case notice shall be deemed delivered upon transmittal, provided that (a) a duplicate copy of the notice is promptly delivered by first-class or certified mail or by overnight delivery, or (b) a transmission report is generated reflecting the accurate transmission thereof. Any notice given by facsimile shall be considered to have been received on the next business day if it is received after 5:00 p.m. recipient’s time or on a non-business day.

City:	City of San Leandro City Hall 835 E. 14 th Street San Leandro, CA 94577 Telephone: 510.577.3354
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Facsimile: 510.577.3340
Attn: City Manager

SL Dark Fiber: SL Dark Fiber
303 W. Joaquin STE 100
San Leandro, CA 94577
Telephone: (510) 877-4383
Facsimile: (510) 405-2001
Attn: Crystal Galvan

12.2. Modification. No waiver, modification or amendment of this License shall be effective or enforceable unless made in writing, signed by SL Dark Fiber and the City and specifying with particularity the nature and extent of such waiver, modification or amendment. Any waiver by the City or SL Dark Fiber shall not affect or impair any right arising from any subsequent default.

12.3. Dispute Resolution Procedure. The City and SL Dark Fiber shall endeavor to resolve all disputes through business-like negotiations, without resort to litigation. Accordingly, if a dispute arises, the Parties shall meet and engage in reasonable good faith negotiations to resolve the matter. If the Parties are unable to negotiate a mutually acceptable resolution within ten (10) calendar days they shall be free to pursue any legal remedies which may be available. Except as to those matters that the Parties mutually agree to be resolved by such alternate dispute resolution mechanisms as the Parties may deem appropriate, all claims, disputes and other matters in question which arise out of or relate to this License shall be decided by a court of competent jurisdiction.

12.4. Governing Law and Forum. This License shall be governed by the laws of the State of California, and any action to enforce or interpret its provisions must be brought in courts with jurisdiction in Alameda County, California.

12.5. Relationship of Parties. The Parties agree that nothing in this License shall be deemed or interpreted to create between them the relationship of lessor and lessee, of buyer and seller, or of partners or joint venturers.

12.6. Attorneys' Fees. In the event any suit, action or proceeding arising from or based upon this License, the Permitted Work or the Scope of Work shall be instituted by SL Dark Fiber or the City, the prevailing party in any such action, suit or proceeding shall be entitled to recover its reasonable attorneys' fees, costs and disbursements, including the cost of reasonable investigation, preparation and professional or expert consultation incurred by reason of such suit, action or proceedings. This attorney fee provision shall not apply to any suit, action or proceeding brought by a third party.

12.7. Severability. If any term or provision of this License or the application thereof shall, to any extent, be held to be invalid or unenforceable, such term or provision shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining terms and provisions of this License or the application of such terms and provisions to circumstances other than those as to which it is held invalid or

unenforceable unless an essential purpose of this License would be defeated by loss of the invalid or unenforceable provision.

12.8. Entire License; Amendments In Writing; Counterparts. This License contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous licenses and understandings, oral and written, between the Parties with respect to such subject matter. This License may be amended only by a written instrument executed by the Parties or their successors in interest. This License may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one License.

12.9. Successors and Assigns; No Third-Party Beneficiaries. This License shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided however, that neither Party shall transfer or assign (either directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise) any of such Party's rights hereunder by operation of law or otherwise without the prior written consent of the other Party, and any such transfer or assignment without such prior written consent shall be void. Subject to the immediately preceding sentence, this License is not intended to benefit, and shall not run to the benefit of or be enforceable by, any other person or entity other than the Parties and their permitted successors and assigns. This provision shall not preclude SL Dark Fiber from contracting with affiliates or third parties to provide telecommunications services using SL Dark Fiber's property in the Project.

12.10. Captions. The captions of the sections and articles of this License are for convenience only and are not intended to affect the interpretation or construction of the provisions hereof.

SIGNATURES ON FOLLOWING PAGE.

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

City of San Leandro

By: _____

Name: _____
City Manager

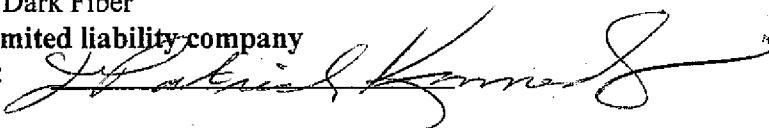
APPROVED AS TO FORM:

By: _____
City Attorney

ATTEST:

By: _____
City Clerk

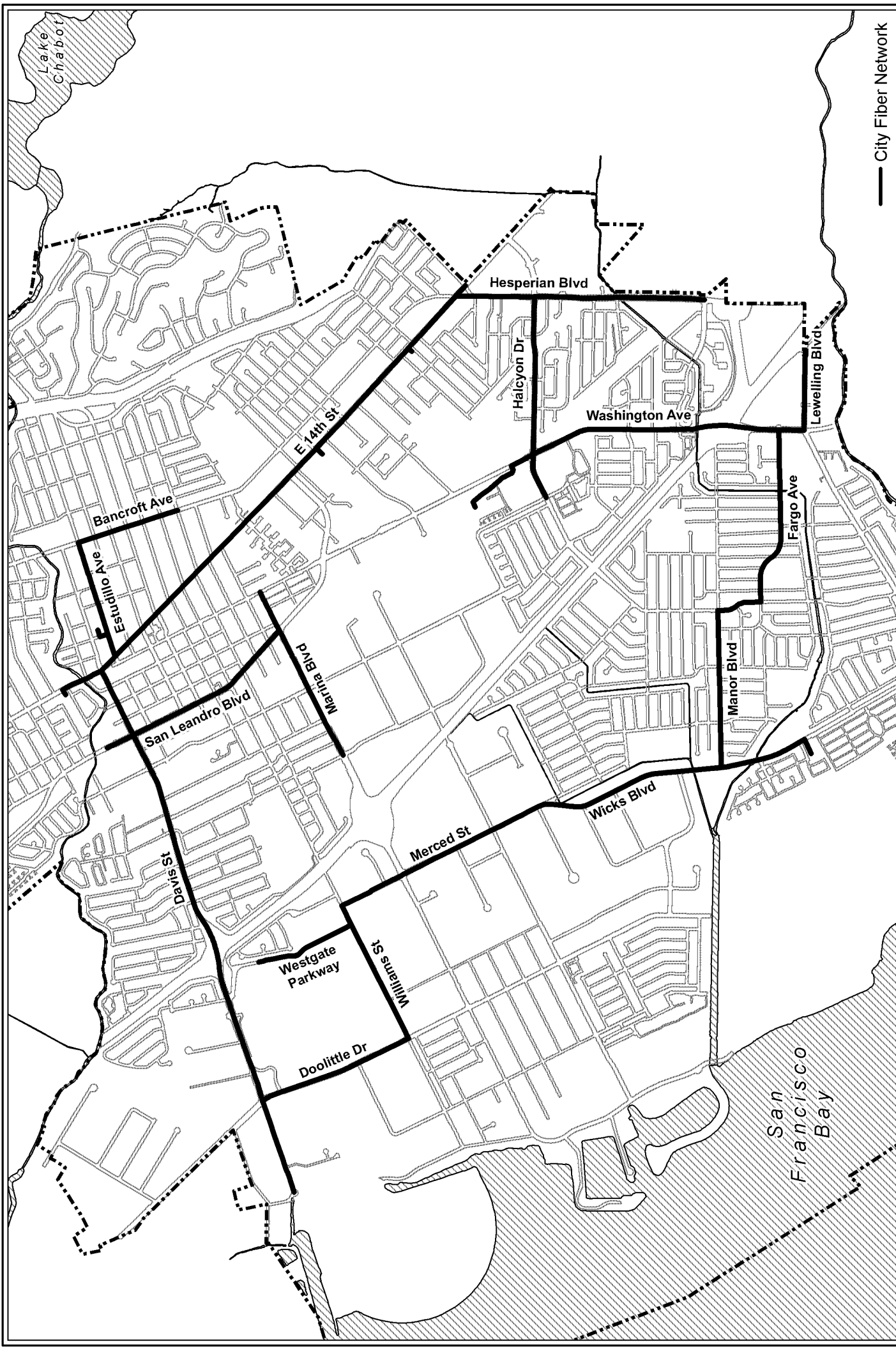
SL Dark Fiber
a limited liability company

By: 

Name: J. Patrick Kennedy _____

Its: [Managing Member]

**EXHIBIT A
PROPERTY**



CITY OF SAN LEANDRO

City Fiber Network

EXHIBIT B
SCOPE OF WORK

Scope of Work. Pursuant to this License, the City authorizes SL Dark Fiber to install the Project in the existing conduit of the Property (hereinafter “**Permitted Work**”) as described in the “**Scope of Work**,” attached as Exhibit C and incorporated herein by this reference. The performance of the Scope of Work shall be at SL Dark Fiber’s own cost and risk, subject to 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.

Traffic Studies, Permits, Fees

Route Verification adding Mule Tape and Trace Cable

Installation of 288 Strand Fiber Optic Cable

Main Cable throughout loop – Approx 60,000 ft including Splices

Splice Loops added to appropriate vaults

Connection to the BART Telecom Vault

Testing throughout

Temporary use of 777 Davis as NOC for testing

Installation of Laterals from time to time to connect customers to the Project (all costs to be borne by San Leandro Dark Fiber)

EXHIBIT C

DEVELOPMENT SCHEDULE

[illegible]

[illegible]

[illegible]

EXHIBIT D
ECONOMIC BENEFITS OF PROJECT
Confirm Project is Consistent with Economic Development Plan and General Plan

The first sentence in the San Leandro General Plan is “San Leandro enters the new millennium with a deep appreciation of its past, a clear understanding of its present, and this shared vision of its future.”

The General Plan further points out that:

Almost a third of the City’s land is used for industrial and commercial purposes, including about 1,800 acres of industrial land and 900 acres of commercial land. Industry and commerce provide thousands of jobs, millions of dollars in annual sales and property tax revenues, and many critical services to San Leandro residents. The City is committed to keeping its economy healthy, maintaining a competitive edge within the region, and staying attractive to established and emerging businesses.

This project recognizes that San Leandro has historically been a City that has supported, via infrastructure such as power, water, rail, highways and sewer, the industrial market. To compete, grow and attract this next generation of business, San Leandro must again act as it did when it built its own, modern sewer facilities. The modern equivalent is a fiber optic Information Highway. Such infrastructure is not only consistent with the General Plan; it is the extension of long standing traditions of attracting jobs to the area and goal of SB 375. In the last few decades, the character of the industries that live in the SF Bay Area has changed from the traditional manufacturing facilities to, as Alvin Tofler called it, the Information Age. It is the access, at sufficient speed, to telecommunications, data centers, and other information enabling technologies. It is the support of the new manufacturing world by considering programs like the Department of Commerce Foreign Trade Zones and the recognition of the world wide nature of investment through tools from the INS like the EB-5/Regional Center visa for jobs program, and state programs like the Enterprise Zone.

The next generation manufacturing will undergo rapid change as new technologies are evolved like the 3D Printing that allows the manufacture of physical items directly from the computer drawings so that an appliance manufacture no longer has to inventory all the formed and machined parts that comprise the appliance. Other manufactures will make high tech devices or software – a strength of the US. These new companies and startups are essential to our economy because we will never recapture plants that are dependent upon low cost labor or natural resources that do not include the price of the environmental damage.

Economic Development efforts in San Leandro are guided by an Economic Development Strategy and Work Program; a document first adopted by the City Council in 1997, and designed to create a positive environment for investment in the local economy. In that document it was noted that the challenge was to attract the investment needed to recycle existing commercial and industrial properties that are no longer functional. It was recognized that it would be important to establish a process for the continual upgrade of the area so that the City does not stagnate; these

correspond to the EDAC vision elements of A Sustainable Community and A Diversified Economy.

The “Lit San Leandro” project is a game changer. It is truly an infrastructure project – it is not being put in for a particular job or upgrade, it is being installed for the use of next generation manufacturers and commercial (e.g. hospitals) operations. Fibers carry extremely large amounts of information very rapidly – it is hard to imagine but in a recent experiment referenced below, the Karlsruhe institute in Germany managed to send 26 terabits per second.

<http://www.gizmodo.com.au/2011/05/record-breaking-laser-beam-transfers-26-terabits-per-second/>

This is hard to quantify but this data transfer speed would transfer the entire Library of Congress across the fiber in 10 seconds. In the case of Internet usage, good Internet today is 1 Mbit and the T-1 – the staple of the telecom industry – is 1.4 Mbit. A typical building for both telecom and Internet usage might have a single T-1 or if really data intensive with 100’s of workers it might use a T-3 (essentially 3 T-1 lines). At the speeds above, a single fiber the diameter of a human could accommodate nearly 2,000,000 T-1 lines. In the fiber industry you need a fiber to send and one to receive and generally you have two pair of fibers that are sent different routes so to “light” a complex it takes 4 fibers. The speed is then a function of the electronic/laser interface at the building and fast equipment today supports 120 channels of 100 GB communication.

Although many might say that this is more than the world will need, it is instructive to look at the telecommunications needs over the last decade. In my company we have grown from a single T-1 to more than the equivalent of 32 T-1 lines and we project orders of magnitude increase in the requirements to accommodate “The Cloud.” In the US many areas are out or close to out of bandwidth because we underestimated or did not envision companies like Netflix, HTTP (the Web), YouTube or Bit Torrent whose users consume over 50% of the download bandwidth of the Internet. We must expect nothing except explosive growth of these kinds of companies with “The Cloud” and we can already see that critical service (e.g. Hospitals, Military) are demanding dedicated networks.

The bottom line is that to create a business that depends upon fiber optic requires:

1. A Loop Structure (for redundancy)
2. Dark Fiber (Dedicated) for High Security Communication
3. Availability
4. Fiber (commonly called “All Glass”) connection to data centers, services providers, and other facilities for distributed companies
5. All of these (1-4) at a reasonable cost.

The Lit San Leandro Project has all of this. It completes an 11 mile loop around San Leandro and connects into the Route Diverse gateway to the rest of the world via BART Telecommunications.

The Economic Benefit to San Leandro would be via property taxes and, if applicable, sales taxes for the manufacturing jobs and supporting commercial operations to support the new employees.

Lease rates today in San Leandro are as low as \$0.40/sq ft/month (Reynolds and Brown) whereas a lit Class A office building would lease for about \$3.00/sq ft/month (David Irmer). This would have the effect of creating a like increase in value of structures and it would help achieve a higher % leased. The most important feature is that it creates a unique feature for next gen manufacturers that cannot be matched in other Bay Area Cities. The closest is Santa Clara (which has its own fiber loop) but because of the proximity to land and workers, is not very competitive with San Leandro. This uniqueness also provides the incentive for building owners and developers to remove the older generation of manufacturer and build high tech buildings and plants. This is critical because most of the existing structures are not suitable for the high tech industry and until the potential upside is large enough, investors cannot justify this curtail step. A description of the Lit San Leandro project is available by email at pat@osisoft.com.

EXHIBIT E
POTENTIAL THIRD PARTIES CONTRACTS

Exhibit F of this License identifies third parties that SL Dark Fiber may contract with to provide telecommunications services using facilities that are included in 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.

Phase 3 Communications

Lit San Leandro