

# City of Brisbane

## Agenda Report

TO: Honorable Mayor and City Council

FROM: Randy Breault, Director of Public Works/City Engineer via City Manager

SUBJECT: Encroachment Agreement for Fiber Optic Facilities

DATE: January 13, 2014

### **City Council Goals:**

To maintain and improve infrastructure. (#3)

To promote economic development that stabilizes and diversifies the tax base. (#4)

### **Purpose:**

To approve an agreement that will regulate how additional fiber optic facilities are installed in the public right-of-way.

### **Recommendation:**

Approve the attached “Encroachment Agreement for Installation of Fiber Optic Network Facilities Within the Public Right-of-Way,” and authorize the Mayor to sign the document on the City’s behalf.

### **Background:**

There are multiple conduits of fiber optic cables installed in Bayshore Boulevard under earlier agreements. Staff was recently approached by one of the owners of said cables, who is in discussion with KTSF to provide telecommunications services over fiber optic lines to their business located at 100 Valley Drive.

The California Public Utilities Commission (CPUC) granted opticAccess, LLC a Certificate of Public Convenience and Necessity, which allows them to provide telecommunications services to business customers in California. (Note that the CPUC decision indicated that opticAccess would not offer residential services.)

The CPUC decision also included a determination that opticAccess’ proposed construction activities were exempt from CEQA.

**Discussion:**

As they are regulated by the CPUC, and are proposing to provide only telecommunication services, the city can not require a Franchise Agreement for the use of our public right-of-way, but we can require an Encroachment Agreement such as the one attached here. Although not required, opticAccess did agree to run fiber optic cable to the property line of the fire station, and also agreed to establish an accessible junction point on Bayshore Boulevard near the Valley Drive Lift Station. This junction point creates an opportunity for the installation of fiber optic cables to be run throughout Crocker Industrial Park.

At present, there are local franchise possibilities only if opticAccess were to expand its service into other areas such as cable television, interactive video, etc.

The attached Encroachment Agreement was prepared by the City Attorney.

**Fiscal Impact:**

There is no expected fiscal impact to the city as a result of the recommended action.

**Measure of Success**

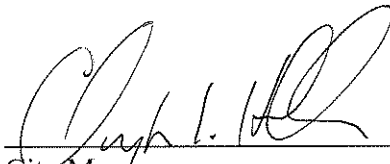
New fiber optic installations per the terms and conditions of the attached agreement.

**Attachments:**

Encroachment Agreement for Installation of Fiber Optic Network Facilities Within the Public Right-of-Way



\_\_\_\_\_  
Director of Public Works/City Engineer



\_\_\_\_\_  
City Manager

**ENCROACHMENT AGREEMENT**  
**FOR INSTALLATION OF FIBER OPTIC NETWORK FACILITIES**  
**WITHIN THE PUBLIC RIGHT-OF-WAY**

**THIS AGREEMENT** dated \_\_\_\_\_, by and between the CITY OF BRISBANE, a municipal corporation ("City") and opticAccess, LLC, ("Contractor"), is made with reference to the following facts:

A. Pursuant to Decision No. 13-01-010 rendered by the California Public Utilities Commission ("PUC") on January 10, 2013, Contractor received a Certificate of Public Convenience and Necessity authorizing Contractor to provide interLATA telecommunications services throughout the State of California and intraLATA private line transmission services within all LATAs in California.

B. Contractor desires to construct, install and maintain Fiber Optic Network Facilities within the Public Right-of-Way and City is willing to allow such activity to be conducted, subject to compliance by Contractor with all of the terms, conditions and requirements as set forth in this Agreement.;

**NOW, THEREFORE, the parties agree as follows:**

**ARTICLE 1**  
**DEFINITIONS**

1.01 "Agency" means any local, county, state or federal governmental agency or quasi-governmental body other than the City, including, without limitation, the PUC and the Federal Communications Commission.

1.02 "Agreement" means this ENCROACHMENT AGREEMENT FOR INSTALLATION OF FIBER OPTIC NETWORK FACILITIES WITHIN THE PUBLIC RIGHT-OF-WAY.

1.03 "Business Day" means any calendar day, except a Saturday, Sunday, and any Day observed as a legal holiday by City. For the purposes hereof, if the time in which an act is to be performed falls on a Saturday, Sunday, or any Day observed as an official holiday by City, the time for performance shall be extended to the following Business Day.

1.04 "City Council" means the City Council of the City of Brisbane.

1.05 "City Engineer" means the City Engineer of the City of Brisbane, or his or her authorized representative.

1.06 "Day" means any calendar day, unless a Business Day is specified.

1.07 "Fee" means any assessment, license, charge, fee, imposition, tax (excluding any utility users tax), or levy lawfully imposed by any governmental body.

1.08 "Fiber Optic Network Facilities" or "Facilities" means without limitation any and all fiber optic cables, conduits, converters, amplifiers, splice boxes, cabinets, manholes, vaults, equipment, drains, appurtenances, and related facilities owned, leased or licensed by Contractor, located or to be located in the Public Right-of-Way of City and used or useful for and in connection with the transmission of telecommunication messages.

1.09 "GVMID" means the Guadalupe Valley Municipal Improvement District, which is a public utility district providing water and sanitary sewer service and operating as a subsidiary district of City. For the purposes of this Agreement, the term "City" shall be deemed and construed to include GVMID, unless expressly stated otherwise.

1.10 "LATA" means "local access and transport area."

1.11 "Law" or "Laws" means any judicial or administrative decision, statute, constitution, ordinance, resolution, regulation, rule, tariff, certificate, order, or other requirement of any municipal, county, state, federal, or other Agency having joint or several jurisdiction over the parties to this Agreement, in effect either at the time of execution of this Agreement or at any time during the location of the Facilities in the Public Right-of-Way. A reference to "Laws" shall include the Standard Drawings and Standard Specifications.

1.12 "Person" means an individual, a corporation, a partnership, a limited liability company, a sole proprietorship, a joint venture, a business trust, and any other form of business association.

1.13 "Provision" means any agreement, clause, condition, covenant, qualification, restriction, reservation, term, or other stipulation in this Agreement or under any Law that defines or otherwise controls, establishes, or limits the performance required or permitted by any party to this Agreement. All Provisions, whether covenants or conditions, shall be deemed to be both covenants and conditions.

1.14 "Public Right-of-Way" means in, upon, along, across, under and over the public streets, roads, lanes, courts, ways, alleys, boulevards, and places, including, without limitation, all public utility easements and public service easements, as the same now or may hereafter exist, that are owned, occupied, leased, or otherwise under the jurisdiction and control of City. This term shall not include any property owned by any Person or Agency other than City except as provided by applicable Laws or pursuant to an agreement between City and any Person or Agency.

1.15 "Standard Drawings and Standard Specifications" means the general terms and conditions, specifications, and requirements of City which govern the design, construction, installation, and maintenance of any improvement within the Public Right-of-Way. CalTrans' Standard Plans and Specifications (1992) as periodically updated, shall be used unless City has other standards which shall then prevail. This term shall include any and all documents entitled "General Conditions" or words of similar import, now or hereafter existing, which directly pertain to all aspects of general construction work.

1.16 "Telecommunications Services" means the transmission of voice, data, and information in rendering teleconferencing and other services which are permitted to be offered by Contractor under applicable Laws. Video services, including, without limitation, community antennae television systems services, shall not be offered by Contractor except as authorized by applicable Laws or pursuant to a certificate of public convenience and necessity issued by the PUC authorizing Contractor to provide dedicated interLATA or intraLATA telecommunications services within the State of California.

**ARTICLE 2**  
**ENCROACHMENT PERMIT WITH**  
**LIMITATIONS AND RESTRICTIONS**

2.01 City hereby agrees to permit Contractor to construct, reconstruct, install, reinstall, maintain and operate, replace, relocate and remove Fiber Optic Network Facilities used for Telecommunications Services within the Public Right-of-Way, such right being expressly made subject to all reservations, covenants, conditions, restrictions and requirements contained in this Agreement and the issuance by City and any other Agency or Person of all permits and approvals required for performance of the work.

2.015 Contractor agrees that any Fiber Optic Network Facility installed pursuant to this Agreement shall include, at no expense to the City, fiber optic cable that shall run across Bayshore Boulevard to the nearest property line of the Brisbane Fire Station (provided that space is reasonably available in the city owned conduits depicted in the drawings attached hereto as Exhibit "A") and shall also include an accessible junction point adjacent to the Valley Drive Lift Station.

2.02 This Agreement is not a grant by City of any property interest but is made subject and subordinate to the prior and continuing right of City and its assigns to lawfully use any or all of the Public Right-of-Way for public facilities, including but not limited to, public use as a street and for the purpose of laying, installing, maintaining, repairing, protecting, replacing and removing sanitary sewers, water mains, storm drains, gas mains, poles, overhead and underground electric and telephone wires, electroliers, cable television and other utility and municipal uses together with appurtenances thereof and with right of ingress and egress, along, over, across and in said Public Right-of-Way. No use of any Public Right-of-Way or other interest or property under this Agreement shall create or vest in Contractor or any other public utility any ownership interest in the Public Right-of-Way, streets or other property or interest of City. Nothing in this Agreement shall be deemed to grant, convey, create, or vest a perpetual real property interest in land in Contractor, including any fee or leasehold interest in land, easement, nor shall anything in this Agreement be deemed or construed to grant or create any franchise rights.

2.03 This Agreement is made subject to all easements, restrictions, conditions, covenants, encumbrances and claims of title which may affect the Public Right-of-Way, and it is understood that Contractor, at its own cost and expense, shall obtain such permission as may be necessary, consistent with any other existing rights. Subject to the Provisions of this Agreement, City hereby licenses and permits Contractor to construct, install, maintain, locate, move, operate, place, protect, reconstruct, reinstall, relocate, remove, and replace the Facilities underground or on existing poles, to the extent Contractor may gain access to these poles consistent with the rights of third parties under applicable Laws and all existing and future agreements, within the Public Right-of-Way for the purposes of providing Telecommunications Services. Any work performed pursuant to the rights granted to Contractor under this Agreement shall be subject to the prior review and approval of the City Engineer.

2.04 The construction, installation, operation, maintenance and removal of said Fiber Optic Network Facilities shall be accomplished without any cost or expense to City and in such a manner as not to endanger persons or property, or unreasonably obstruct travel on any road, walk or other access thereon within said Public Right-of-Way, or interfere in any manner with any existing or proposed public or private utilities or any facilities of City installed or to be installed therein.

**ARTICLE 3  
COMPLIANCE WITH STANDARDS**

3.01 Contractor agrees to keep said Fiber Optic Network Facilities in good and safe condition and free from any nuisance, to the reasonable satisfaction of the City Engineer.

3.02 Contractor shall construct, install, operate and maintain all Fiber Optic Network Facilities in accordance and in conformity with all applicable City, State, Federal and regulatory agency laws, ordinances, rules and regulations.

**ARTICLE 4  
SERVICE CHANGE**

4.01 Contractor represents that the Facilities will be used for the sole purpose of rendering the Telecommunication Services consistent with the certificate of public convenience and necessity issued to Contractor by the PUC. If the nature or character of Contractor's service changes to include additional or alternative services that directly affects the regulatory authority of City, including but not limited to, community antenna television systems or commercial video programming, Contractor shall give City as much advance written notice as practicable, and will give at least six (6) months prior notice, of its intent to change the service provided by way of the Fiber Optic Network Facilities installed under this Agreement, and comply with the City's lawful fee and/or franchise requirements. Contractor acknowledges that any expansion or change in the character or nature of the Telecommunications Services may increase City's regulatory authority over such services, and this may require Contractor to enter into a new Agreement consistent with the requirements of a hereinafter-enacted City ordinance regulating such services or the expansion or change in services, if such service changes fall under the lawful regulation, jurisdiction or authority of City.

**ARTICLE 5  
RESERVATION OF RIGHTS**

5.01 City reserves any and all rights it may have now or in the future to legally regulate or otherwise condition the use of the fiber optics infrastructure and technology and related activities and services to be provided pursuant to the installation subject to this Agreement.

5.02 City's agreement hereto is not a waiver of and is without prejudice to any right City may have under law to regulate, tax or impose fees or charges on Contractor or any right Contractor may have under the law to provide services through the fiber optic infrastructure pursuant to state or federal laws, rules or regulations. Contractor shall be subject to any future taxes, fees or charges that the City lawfully imposes on the fiber optics infrastructure and fiber optic services in the future, including, but not limited to a rental or other charge for use of the public right of way and/or a utility user tax. Nothing herein shall affect in any way City's power or right to impose or collect any tax or fee on users or providers of the services to be provided by Contractor. Nothing herein is intended to impose regulations or conditions on Contractor that City is preempted from imposing by state or federal laws.

## ARTICLE 6 REMOVAL AND RELOCATION

6.01 Contractor shall remove or relocate, without cost or expense to City, any of its Fiber Optic Network Facilities installed, used and maintained under this Agreement if and when made necessary by any change of grade, alignment or width of any street, sidewalk or other public facility, including the construction, maintenance or operation of any underground or aboveground facilities by City. In the event all or any portion of said Public Right-of-Way occupied by said Fiber Optic Network Facilities shall be needed by City, or in the event the existence of said Fiber Optic Network Facilities shall be considered detrimental to governmental activities, including but not limited to, interference with City construction projects, or is in conflict vertically and/or horizontally with any proposed City installation, Contractor shall remove and relocate said Fiber Optic Network Facilities to such other location or locations on said Public Right-of-Way as may be designated by City. Said removal or relocation shall be completed within one hundred twenty (120) days of notification by City unless exigencies dictate a shorter period for removal or relocation. In the event said Fiber Optic Network Facilities are not removed or relocated within said period of time, City may cause the same to be done at the expense of Contractor and Contractor shall reimburse the City any and all expenses, including administrative overhead. If Contractor shall fail to vacate or otherwise remove the Facilities as required by City, City shall be entitled to vacate or otherwise remove the Facilities at Contractor's sole cost and expense. Contractor shall execute such documents of title as will convey all right, title, and interest in the dedicated Facilities, or any part thereof, to City. As used in this paragraph only "City" shall include any other Agency having a permit or jurisdiction to place Facilities within the Public Right-of-Way. In case of conflict, approval from City to proceed shall be mandatory.

6.02 Contractor shall, at its sole cost and expense, replace aerial and/or aboveground Fiber Optic Network Facilities, if any, with underground facilities in accordance with the same rules applicable to Pacific Bell or Pacific Gas and Electric Company, as now existing or hereinafter amended.

6.03 If any portions of the Fiber Optic Network Facilities covered under this Agreement are no longer used by Contractor, or are not used, or abandoned for a continuous period in excess of six (6) months, Contractor shall notify City and shall either promptly vacate and remove the Facilities at its own expense or, at City's discretion, may be allowed to abandon some or all of the Facilities in place. If Contractor is permitted by City to abandon its Facilities in place, any such abandoned Facilities shall be deemed conveyed to City and Contractor shall have no further obligation to remove, relocate or maintain said Facilities; *provided, however*, that nothing herein shall affect Contractor's obligation to perform any repairs required under Article 9 of this Agreement. Unless specifically permitted in writing by City to remain in place, which permission shall not be unreasonably withheld or delayed, all boxes or other Facilities exposed to the surface will be required to be removed and the surface restored.

6.04 When removal or relocation is required under this Agreement, Contractor shall, after the removal or relocation of the Fiber Optic Network Facilities, at its own cost, repair and return the Public-Right-of-Way on which the Facilities were located to a safe and satisfactory condition in accordance with the construction-related conditions and specifications established by City according to its standard practice. Should Contractor remove the Fiber Optic Network Facilities from the Public Right-of-Way, Contractor shall, not less than ten (10) days before such removal, give notice thereof to City specifying the right-of-way affected and the location thereof as well as the preferred date of removal. Before proceeding with removal or relocation work, Contractor shall obtain an Encroachment Permit from the City Engineer. If Contractor does not return the affected site to a safe and satisfactory condition, then City shall have the option to perform or cause to be performed such reasonable and necessary work on

behalf of Contractor and charge the actual costs incurred to Contractor. Upon the receipt of a demand for payment by City, Contractor shall reimburse City for such costs.

## **ARTICLE 7 ENCROACHMENT PERMIT AND FEES**

7.01 Contractor shall apply for a project specific Encroachment Permit for all work within the Public Right-of-Way and any other regulatory permits. Contractor shall furnish detailed plans of the work prepared by a registered professional engineer and other such information as required by the City Engineer, including a detailed map showing the layout of the proposed Facilities and all existing facilities located in or immediately adjacent to the area subject to the Encroachment Permit. Prior to issuance of the permit, Contractor shall pay or deposit with City all applicable costs such as processing fees, field marking, plan review, engineering and inspection fees related to the proposed work, and City's actual legal fees (including fees charged to City for the preparation of this Agreement), in accordance with the rates in effect at the time the application for permit is submitted to City. All work within the Public Right-of-Way shall be performed by Contractor in accordance with the plans and specifications approved by the City Engineer, and in compliance with all general and specific conditions set forth in the Encroachment Permit and all conditions and requirements contained in this Agreement.

7.02 The Encroachment Permit shall set forth the description of the Fiber Optic Network Facilities to be installed and the Public Right-of-Way in which such Facilities are to be located. Contractor shall utilize contractors licensed in the State of California to accomplish any work. Contractor and any of its agents working in the City shall obtain a current City business license. Upon the completion of construction work, Contractor promptly shall furnish to City accurate "as-built" plans and record drawings prepared and certified by a registered professional engineer showing in detail, to the reasonable satisfaction of the City Engineer, the exact location, depth, and size of the Facilities in the Public Right-of-Way, including, without limitation, the profiles of all street crossings. These plans and drawings shall be incorporated in one set of 3 mil minimum thickness, good quality transparent mylar drawings. Contractor shall furnish to City electronic disks which utilize AutoCAD containing the full set of plans and record drawings. To the extent directional boring or other similar methods are used to construct or install the Facilities, Contractor also shall pothole all City mains and customer services lines prior to crossing, over, under, or between such Underground Facilities. Contractor shall identify the Fiber Optic Network Facilities installed in each Public-Right-of-Way by means of an identification method mutually agreed upon by City and Contractor. Such identification shall be detectable from ground level without opening the street.

## **ARTICLE 8 PERFORMANCE BOND**

8.01 Prior to the issuance of an Encroachment Permit, Contractor shall provide City with a performance bond naming City as obligee in the amount equal to one hundred percent (100%) of the cost of the work to be performed by or on behalf of Contractor within and affecting the Public Right-of-Way to guarantee and assure the faithful performance of Contractor's obligations under this Agreement. City shall have the right to draw against the surety bond in the event of a default by Contractor or in the event that Contractor fails to meet and fully perform any of its obligations under this Agreement; provided that Contractor is first given written notice of any intent to draw against the bond and an opportunity to cure within a reasonable period of time. Following completion of the work by Contractor, and its inspection and acceptance by the City Engineer, the performance bond shall remain in effect to the extent of ten



percent (10%) of the cost of the work to guarantee and assure the faithful performance of Contractor's obligations under this Agreement for a period of one year from the City's acceptance of the work. City shall have the right to draw against the bond in the event of a default by Contractor or in the event that Contractor fails to meet and fully perform any of its obligations. The form and content of the performance bond, and the surety issuing such bond, shall be subject to approval by City.

## **ARTICLE 9 DAMAGE TO FACILITIES IN PUBLIC RIGHT-OF-WAY OR ON PRIVATE PROPERTY**

9.1 Contractor shall be responsible for any damage to City street pavements, existing utilities, curbs, gutters, sidewalks or to any private property or improvements to the extent attributable to its installation, maintenance, repair or removal of its Fiber Optic Network Facilities in Public Right-of-Way and shall repair, replace and restore in kind any such damaged facilities at its sole expense and to the approval of the City Engineer.

9.2 Any premature deterioration of the surface or subsurface improvements, as determined by the City Engineer, shall be the responsibility of Contractor to the extent attributable to Contractor's activities. This responsibility shall survive this Agreement or any abandonment of the Facilities for a period of two (2) years from the date of Contractor's most recent installation of or improvements on the Facilities. Contractor shall commence the performance of all necessary repairs immediately upon receipt of written notice from the City Engineer to do so and shall cause the same to be completed within a reasonable period of time; however, under no circumstances may such period of time exceed 30 days. In the event the repairs are not made in the manner and within the time prescribed herein, the City may elect to perform the repair work and charge all costs incurred by City in connection therewith to Contractor.

9.3 If the Public Right-of-Way to be used by Contractor has preexisting installation(s), Contractor shall assume the responsibility to verify the location of the preexisting installation and notify City and any third party of Contractor's proposed installation. The cost of any work required of such third party or City to provide adequate space or required clearance to accommodate Contractor's installation shall be borne solely by Contractor.

## **ARTICLE 10 PARTICIPATION WITH OTHER UTILITIES**

10.1 Contractor agrees to cooperate in the planning, locating and constructing of its Fiber Optic Network Facilities in joint utility trenches or common duct banks with other similar utilities and to participate in cost-sharing for the joint trench and ducts, when such joint utility installations are being planned for or such opportunities exist in any area; provided that such activities do not impair or disrupt Telecommunications Services of Contractor.

## **ARTICLE 11 RECORDS AND FIELD LOCATIONS**

11.1 Contractor shall maintain accurate maps and improvement plans of said Fiber Optic Network Facilities located within the City. The maps and plans are to accurately show in detail the location, size, depth and description of all facilities as constructed. Prior to City acceptance of the work,

Contractor shall deliver to the office of the City Engineer free of charge, and at any subsequent time, upon request, to other third parties interested in performing work within Public Right-of-Way for a reasonable charge upon request and within thirty (30) days after such request, such maps and plans of all Fiber Optic Network Facilities installed within said Public Right-of-Way. When required by the City for the purpose of confirming the location of Facilities to accomplish the design or construction of public facilities, Contractor shall, at its sole cost and expense, expose by potholing to a depth of one-foot below the bottom of its subsurface, Fiber Optic Network Facilities, within thirty (30) days of receipt of a written request from City to do so.

11.2 Contractor shall install a locator wire in conjunction with the construction of the Fiber Optic Network Facilities pursuant to this Agreement.

11.3 Contractor shall be a member of the regional notification center for subsurface installations (Underground Services Alert) and shall field mark, at its sole expense, the locations of its underground Fiber Optic Network facilities upon notification in accordance with the requirements of Section 4216 of the California Government Code, as it now reads or may hereinafter be amended.

## **ARTICLE 12**

### **HOLD HARMLESS AND INDEMNIFICATION**

12.1 Contractor, for itself, its successors, agents, contractors and employees, hereby agrees to release, defend (with counsel satisfactory to City) and indemnify City, and its officers, officials, volunteers, employees and agents (all of the above hereinafter collectively, known as "Indemnitees"), from and against all claims, causes of action, proceedings, losses, damages, liability, cost, and expense (including, without limit, any fines, penalties, judgments, litigation costs, attorneys' fees and consulting, engineering and construction costs) for actual loss of or damage to property and for injuries to or death of any person (including, but not limited to, the property and employees of each party) ("Liability") when caused by, arising out of or related to the activities or Facilities described in this Agreement. The duty of Contractor to indemnify and save harmless includes the duties to defend as set forth in Section 2778 of the Civil Code. It is the express intent of the parties that Contractor will indemnify and hold harmless Indemnitees from any and all claims, suits or actions arising from any cause whatsoever as set forth above regardless of the existence or degree of fault or negligence on the part of City, Contractor, or any subcontractor or employee of any of these, except to the extent the Liability was the result of the negligence, willful misconduct or criminal acts of the City, or its directors, officers, officials employees and agents.

12.2 Should any discharge, leakage, spillage, emission or pollution of any type occur upon or from the Public Right-of-Way attributable to Contractor's use or occupancy, Contractor at its expense, shall clean all affected property to the reasonable satisfaction of City and any governmental body having jurisdiction. Removal and disposal of all excavation materials, hazardous, toxic, or not, shall be the sole responsibility of Contractor. Contractor shall indemnify, hold harmless and defend Indemnitees (with counsel satisfactory to City) against all claims, courts or administrative proceedings seeking to impose liability on City as a result of Contractor's breach of this section or as a result of any such discharge, leakage, spillage, emission or pollution, regardless of whether such liability, cost or expense arises during or after the term of this Agreement.

12.3 The obligations of Contractor under this Article 12 to indemnify and hold harmless shall survive termination of this Agreement.

12.4 Except to the extent of City's gross negligence, willful misconduct or criminal acts, under no circumstances shall City be liable or otherwise responsible to Contractor or its customers for any loss of service, downtime, lost revenue or profits, third-party damages, or any other damage, loss or liability of any kind occurring by reason of anything done or omitted to be done by City or by any third party, including, without limitation, damages, losses, or liability arising from the issuance or approval by City of a permit to any third party or any interruption in Telecommunications Services.

### ARTICLE 13 INSURANCE

13.1 Any person, firm or corporation Contractor authorizes to work upon the Public Right-of-Way, including any subcontractor, shall be deemed to be Contractor's agent and shall be subject to all the applicable terms of this Agreement and the Encroachment Permit issued pursuant hereto. Prior to entry upon the Public Right-of-Way by such agents, Contractor shall provide City with satisfactory evidence (e.g. in the form of a Certificate of Insurance) that it and its contractors or other agents who will obtain access to the Public Right-of-Way pursuant to this Agreement or the Encroachment Permit are insured in accordance with the following, which insurance shall remain in effect throughout the term of this Agreement and shall be at the sole cost and expense of Contractor (or its agents). Prior to the start of the work or entry onto the Public Right-of-Way, Contractor agrees to procure and maintain, and to require its contractor(s) to procure and maintain, at its (or its contractors') sole cost and expense (and to prove to City's reasonable satisfaction that it remains in effect throughout the work), the kinds of insurance described below:

- (a) Workers' Compensation and Employers' Liability Insurance. Contractor shall secure the payment of Workers' Compensation in accordance with the provisions of Section 3700 of the California Labor Code (and any amendments thereto or successor acts or statutes) and Contractor shall furnish City with a certificate evidencing such coverage together with a verification thereon as follows:

"I am aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against a liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of work under this Agreement."

Contractor shall also maintain Employer's Liability coverage with minimum limits of \$2,000,000.

Whether FELA or Workers' Compensation applies, Contractor shall furnish the City with the Certificate(s) of Insurance required hereunder prior to the commencement of work. The Certificate shall also provide that Contractor's policy will not be canceled or have coverage changed in any way without thirty (30) days' prior written notice to City.

- (b) Commercial General Liability insurance. Contractor shall, at its own cost and expense, also procure and maintain Commercial General Liability insurance which shall include as additional insureds the City and GVMID, and their respective elected and appointed councilmembers, directors, officers, officials, employees and agents while acting in such capacity, and their successors or assignees, as they now, or as they may hereafter be constituted, singly, jointly or severally.

Insurance shall provide bodily injury and property damage coverage with a combined single limit of at least \$2,000,000 each occurrence or claim and a general aggregate limit of at least \$2,000,000. Claims-made policies are not acceptable. This insurance shall include but not be limited to premises and operations; contractual liability covering the indemnity provisions contained in this Agreement; personal injury; explosion, collapse and underground coverage, products and completed operations, and broad form property damage. Prior to commencing work or entering onto the Property, Contractor shall file an endorsement and Certificate(s) of Insurance with the City Manager evidencing coverage, and upon request, a certified duplicate original of the policy. Each Certificate shall indicate that the insurance policy provides or has been endorsed to provide:

- (1) That the insurance company issuing such policy shall give written notice to the City Manager of any material alteration, or reduction in aggregate limits, if such limits apply, and provide at least thirty (30) days' notice of cancellation; and
  - (2) That the policy is primary insurance and the insurance company providing such policy shall be liable thereunder for the full amount of any loss or claim which Contractor is liable for under this Section, up to and including the total limit of liability, without right of contribution from any other insurance effected or which may be effected by the City or GVMID; and
- (c) Automobile Liability Insurance. Contractor shall, at its own cost and expense, procure and maintain Automobile Liability insurance providing bodily injury and property damage with a combined single limit of at least \$2,000,000 per occurrence for all owned, non-owned and hired automobiles. This insurance shall provide contractual liability covering all motor vehicles and mobile equipment to the extent coverage may be excluded from general liability insurance. Such insurance shall include as an additional insured the City and GVMID, and their respective officers, officials, employees and agents while acting in such capacity, and their successors or assignees, as they now or as they may hereafter be constituted, singly, jointly or severally.
- (d) Property Insurance. Contractor shall, at its own cost and expense, procure and maintain property insurance to protect its interest in the equipment to be used in performance of this Agreement and the City's interest in materials or property to be installed, covering all risks of physical loss or damage to such equipment. The coverage under such policy shall have limits of liability adequate to protect the value of the equipment and property to be installed. If desired, Contractor may choose to self-insure this exposure, but in no instance shall the City be responsible for such loss or damage, unless caused by its sole negligence.

13.2 Any insurance company providing coverage required by this Agreement shall be authorized to do business in the State of California and shall be rated at least A:VI in Best's Key Rating Guide.

13.3 Prior to the commencement of work under this Agreement, any deductibles or self-insured retentions must be stated on the Certificate(s) of Insurance and approved by the City Engineer.

13.4 All insurance specified in this Article 13 shall remain in force until all work to be performed is satisfactorily completed, all of Contractor's personnel and equipment have been removed from the Public Right-of-Way, and the work has been formally accepted by the City Engineer. The

failure to procure or maintain required insurance and/or an adequately funded self-insurance program will constitute a material breach of this Agreement.

#### **ARTICLE 14 NOTIFICATIONS**

14.1 Contractor shall, prior to the issuance of an Encroachment Permit or consistent with other provisions of the Encroachment Permit, certify to City that it has provided or will provide written notification of its intent to perform work to the property owners, residents and business operators of all properties adjacent to streets and/or right(s)-of-way where Contractor will be excavating. Unless otherwise agreed by City, said notice, shall be mailed to the property owner as listed on the most recent assessor's tax roll at least seven (7) days prior to the issuance of an Encroachment Permit, and delivered to the residents and business operators.

#### **ARTICLE 15 ASSIGNMENT**

15.1 This Agreement shall not be assignable by Contractor without the explicit written approval of City, which approval shall not be unreasonably withheld, provided, however, that Contractor may assign the rights granted herein to a parent, successor, subsidiary or affiliate of Contractor, now or hereinafter existing, by only providing notice to City of such assignment. However, this Agreement shall be binding on successors and assigns and shall be disclosed to assignee. Assignee shall unconditionally assume all of the duties and obligations of Contractor hereunder and agree in writing to be bound by all of the terms and provisions of this Agreement within ninety (90) days of assignment or this Agreement shall terminate without further action by City.

#### **ARTICLE 16 ENTIRE AGREEMENT**

16.1 This Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements or understandings (whether oral or written) between or among the parties relating to the subject matter of this Agreement which are not fully expressed herein. This Agreement may not be amended except pursuant to a written instrument signed by all parties.

#### **ARTICLE 17 SEVERABILITY**

17.1 If any one or more of the covenants or agreements or portions thereof provided in this Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable or unenforceable, such covenant or covenants, such agreement or agreements, or such portions thereof shall be null and void and shall be deemed separable from the remaining covenants or agreements or portions thereof and shall in no way affect the validity or enforceability of the remaining portions of this Agreement, and the parties shall negotiate in good faith to replace any such covenant, agreement or portion found to be null and void.

## **ARTICLE 18 TERMINATION**

18.1 This Agreement may be terminated by City upon thirty (30) days written notice to Contractor if City determines that the provisions herein interfere with the use or disposal of said Public Right-of-Way or any part thereof by City. Where only a portion of Contractor's Fiber Optic Network Facilities interferes with the use or disposal of said Public Right-of-Way, City, at its sole discretion, may elect to require Contractor to relocate the said portion in accordance with Article 6 of this Agreement. This Agreement may be terminated by City for failure, neglect or refusal by Contractor to fully and promptly comply with any and all of the conditions of this Agreement, or for nonuse of the Facilities, upon thirty (30) days written notice, unless Contractor confirms within thirty (30) days of receipt of the notice that the cited condition has ceased, been corrected or, subject to City's agreement, is diligently being pursued by Contractor.

18.2 Upon termination of this Agreement, and upon written request by City, Contractor, at its own cost and expense agrees to remove or, at City's discretion, abandon in place some or all of its Fiber Optic Network Facilities from the Public Right-of-Way and restore the Public Right-of-Way as set forth in the Removal and Relocation provisions of this Agreement. Should Contractor in such event fail, neglect or refuse to make such removals or restoration within ninety (90) days of City's written request, at the sole option of City, such removal and restoration may be performed by City at the expense of Contractor, which expense Contractor agrees to pay to City upon demand.

## **ARTICLE 19 NOTICE**

19.1 All notices given or which may be given pursuant to this Agreement shall be in writing and transmitted by United States mail or by private delivery systems or by facsimile if followed by United States mail or by private delivery systems as follows:

To City:	City of Brisbane Attention: Director of Public Works/City Engineer 50 Park Lane Brisbane, CA 94005
To Contractor:	opticAccess, LLC Attention: Jeff Yount, Chief Operating Officer 533 Airport Blvd., Suite 400 Burlingame, CA 94010

Any notice sent by mail shall be deemed received on the third Business Day after deposit of the notice in the U.S. Mail with proper postage prepaid thereon.

## **ARTICLE 20 ATTORNEY FEES AND LITIGATION**

20.1 In the event of litigation between the Parties hereto, the prevailing party shall be entitled to reasonable attorney fees and costs.







AWG OR CABLE	CONDUCTOR DESIGNATION	CONDUCTOR SCHEDULE								
		NUMBER OF CONDUCTORS								
		RUN NUMBER								
		1	2	3	4	5	6	7	8	9
No. 14	#1	8	3	3	—	—	—	—	—	—
	#2	8	3	3	3	—	—	—	—	—
	#3	8	3	3	—	—	—	—	—	—
	#4	8	3	3	—	—	3	3	3	—
	#5	8	3	3	3	—	—	—	—	—
	#6	8	3	3	3	—	3	3	3	—
	#7	8	3	3	3	—	3	3	3	—
	#8	8	3	3	3	—	3	3	3	—
	#9	8	3	3	3	—	3	3	3	—
	#10	8	3	3	3	—	3	3	3	—
	#11	8	3	3	3	—	3	3	3	—
	#12	8	3	3	3	—	3	3	3	—
	#13	8	3	3	3	—	3	3	3	—
	#14	8	3	3	3	—	3	3	3	—
	#15	8	3	3	3	—	3	3	3	—
	#16	8	3	3	3	—	3	3	3	—
	#17	8	3	3	3	—	3	3	3	—
	#18	8	3	3	3	—	3	3	3	—
No. 8	SIGNAL COMMON	2	1	1	1	—	1	1	1	—
	STREET LIGHTING (240V)	4	2	2	2	—	2	2	—	—
	TRACE	—	1	1*	1	1*	—	—	—	1*
	TOTAL No. 8	6	4	4	4	1	3	3	1	1
LOOP DETECTOR CABLES	1HU	1	—	—	—	—	1	1	1	1
	1HL	1	—	—	—	—	1	1	1	1
	2HU	1	—	—	—	—	—	—	—	—
	2HL	1	—	—	—	—	—	—	—	—
	3HU	1	—	—	—	—	—	—	—	—
	3HL	1	—	—	—	—	—	—	—	—
	4HU	1	—	—	—	—	—	—	—	—
	4HL	1	—	—	—	—	—	—	—	—
	5HU	1	—	—	—	—	—	—	—	—
	5HL	1	—	—	—	—	—	—	—	—
	6HU	1	—	—	—	—	1E	1E	1E	—
	6HL	1	—	—	—	—	1E	1E	1E	—
TOTAL CABLES		12	2	2	2	—	5	4	4	2
1/2" PULL ROPE		—	1	1*	1	1*	—	—	—	—
CONDUIT SIZE (inches)		2-3" E	3"	3"	3"	3"	3" E	3" E	3" E	3"

ALL CONDUCTORS AND CABLES TO BE NEW UNLESS OTHERWISE NOTED.  
E = EXISTING CONDUCTORS/CABLES OR CONDUIT  
\* = EXISTING CONDUCTORS/CABLES OR CONDUIT INSTALLED AS PART OF PAVEMENT OVERLAY PROJECT

			CAUTION	DESIGNED <u>DM</u>
			IF THIS BAR DOES	DRAWN <u>DM/SB</u>
			NOT MEASURE 1"	REVIEWED <u>BRIAN SOWERS, P.E.</u>
			THEN DRAWING IS	
			NOT TO SCALE	

007073000

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