

15-1325

**ENCROACHMENT AGREEMENT
BETWEEN THE CITY OF PLEASANTON
AND OPTICACCESS LLC,
FOR THE CONSTRUCTION, INSTALLATION, MAINTENANCE, AND OPERATION
OF FIBER OPTIC NETWORK FACILITIES
WITHIN THE PUBLIC RIGHT-OF-WAY**

This Agreement ("Agreement") is dated for identification this 1st day of July, 2014, by and between the CITY OF PLEASANTON, a California municipal corporation (herein termed "CITY"), and opticAccess LLC, a Nevada limited liability company (herein termed "COMPANY").

RECITALS

WHEREAS, COMPANY has a certificate of qualification to do business in the State of California; and

WHEREAS, COMPANY is authorized to provide telecommunications services in the State of California by the Public Utilities Commission of the State of California (herein termed PUC); and

WHEREAS, COMPANY desires to construct, install, and maintain Fiber Optic Network Facilities within the Public Right-of-Way within CITY; and

WHEREAS, CITY has the authority to regulate the terms and conditions for the use of Public Right-of-Way for the construction, installation, and maintenance of Fiber Optic Network Facilities by private telecommunications services providers;

NOW, THEREFORE, in consideration of the recitals and the mutual promises contained herein, CITY and COMPANY agree as follows:

DEFINITIONS

COMPANY—Shall mean COMPANY, and its lawful successors or assigns.

CITY—Means the City of Pleasanton, a municipal corporation of the State of California, and includes the duly elected or appointed officers, agents, employees, and volunteers of the City of Pleasanton, individually or collectively.

Public Right-of-Way—Means in, upon, along, across, under, and over the public streets, ways, alleys, and places, and including public utility easements and public service easements, as the same now or may thereafter exist that are under jurisdiction of or controlled by said CITY.

Fiber Optic Network Facilities or "Facilities"—Means COMPANY's fiber optic cables, coaxial and copper cables, conduits, converters, splice boxes, cabinets, handholes, manholes,

vaults, equipment, drains, surface location markers, appurtenances, and related facilities located or to be located in the Public Right-of-Way of CITY and used or useful for the transmission of telecommunication data.

LIMITATIONS AND RESTRICTIONS

1. CITY hereby grants an encroachment permit to COMPANY, subject to reservations, covenants, and conditions herein contained, to construct, reconstruct, install, reinstall, maintain and operate, replace, relocate, and remove Fiber Optic Network Facilities used for telecommunications services within Public Right-of-Way located within the corporate limits of the City of Pleasanton, subject to obtaining all required permits and approvals.

2. 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 use all Public Right-of-Way in the performance of its duty, 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, electroliners, 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; provided, however, should COMPANY be required to relocate its Fiber Optic Network Facilities due to the actions of any nongovernmental third party, such third party shall be required to reimburse COMPANY for its full cost of such relocation and COMPANY shall not be required to relocate its facilities until it receives an executed reimbursement agreement from the nongovernmental third party, unless removal is required to protect or preserve the public health, safety, welfare, or interest.

3. This Agreement is made subject to all easements, restrictions, conditions, covenants, encumbrances, and claims of title which may affect said Public Right-of-Way, and it is understood that COMPANY, at its own cost and expense, shall obtain such permission as may be necessary consistent with any other existing rights.

4. The construction, installation, operation, maintenance, and removal of said Fiber Optic Network Facilities shall be accomplished without cost or expense to CITY subject to the approval of CITY's Public Works Director in such a manner as not to endanger personnel or property, or unreasonably obstruct travel on any road, walk or other access thereon within said Public Right-of-Way.

COMPLIANCE WITH STANDARDS

5. COMPANY shall at all times during the duration of this Encroachment Agreement maintain said Fiber Optic Network Facilities in good and safe condition and free from any nuisance to the satisfaction of CITY's Community Development Director or his or her designee.

6. COMPANY 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 applicable under this Agreement.

SERVICE CHANGE

7. COMPANY provides interstate and intrastate telecommunications services in California pursuant to its Certificates of Public Convenience and Necessity received from the PUC.

8. COMPANY hereby warrants that the type of service offered to its customers through the Fiber Optic Network Facilities in said Public Right-of-Way consists solely of business and residential telecommunications services, presently permitted by law. If COMPANY is authorized by the PUC to change the nature and character of its service and such service changes are to include additional and/or alternative services that are subject to the regulatory authority of CITY, including, but not limited to, wireless telecommunications services and mobile or digital Voice over Internet Protocol (VoIP) services, and not preempted by State or Federal law, COMPANY shall notify CITY in writing, as soon as practicable, but in no event later than thirty (30) days following such a decision by the PUC, and comply with CITY's fee, franchise, and/or permit requirements. COMPANY acknowledges that any expansion or change in the character and nature of the telecommunications service in general may increase CITY's regulatory authority over such service and/or product, and this may, at CITY's election, require COMPANY 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 service, if all or any part of such service change falls under the regulation, jurisdiction, and authority of CITY.

NO FRANCHISE RIGHTS CREATED

9. Nothing in this Agreement shall be construed as granting or creating any franchise rights.

TELECOMMUNICATIONS USERS TAX

10. In the event that CITY subsequently lawfully enacts any utility user tax which is applicable to the users of opticAccess Facilities with respect to the use of such Facilities, opticAccess shall collect and distribute to the CITY the utility users tax from its service users, if opticAccess' Facilities are used to provide revenue-producing utility services as defined in such ordinance authorizing the tax.

POSSESSORY INTEREST TAX

11. COMPANY shall pay the possessory interest tax, if any, that may be levied by the County of Alameda against COMPANY.

REMOVAL AND RELOCATION

12. COMPANY shall remove or relocate, without cost or expense to CITY, any Fiber Optic Network Facilities installed, used, and maintained under this Agreement if and when made necessary by any lawful change of grade, alignment, or width of any street, including the

construction, maintenance, or operation of any underground facility by CITY and/or the construction, maintenance, or operation of any other CITY underground or aboveground facilities. 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 for governmental purposes 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, COMPANY shall, following City Council resolution, 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 ninety (90) days of notification by CITY. In the event said Fiber Optic Network Facilities are not removed or relocated within ninety (90) days after said notification, CITY may cause the same to be done at the sole expense of COMPANY.

13. In those areas and portions of CITY where the transmission or distribution facilities of either the public utility providing telephone service or those of the utility providing electric service are underground or hereafter may be placed underground, then COMPANY shall likewise construct, operate, and maintain all of its Fiber Optic Network Facilities underground. For the purposes of this subsection, "underground" shall include a partial underground system. CITY shall not in any manner be responsible for any costs incurred by COMPANY in placing COMPANY's facilities underground. Upon application by COMPANY, CITY's City Manager or his/her designee, in CITY's sole discretion, may allow these undergrounding requirements to be waived.

14. If any portions of the Fiber Optic Network Facilities covered under this Agreement other than redundant facilities or facilities for emergency use are no longer used by COMPANY, or are abandoned for a period in excess of one (1) year, COMPANY shall notify CITY and shall either promptly vacate and remove the facilities at its own expense or, at CITY's discretion, may abandon some or all of the facilities in place.

15. When removal or relocation are required under this Agreement, COMPANY shall, after the removal or relocation of the Fiber Optic Network Facilities, at its own cost, repair and return said Public Right-of-Way or public utility or service easements on which the facilities were located to a safe and satisfactory condition in accordance with the construction-related conditions and specifications as established by CITY according to its standard practice. Should COMPANY remove the Fiber Optic Network Facilities from said Public Right-of-Way, COMPANY shall, within ten (10) days after such removal, give notice thereof to CITY specifying the right-of-way affected and the location thereof as well as the date of removal. Before proceeding with removal or relocation work, COMPANY shall obtain and CITY shall issue an excavation permit from CITY.

CONSTRUCTION PERMIT AND FEES

16. COMPANY shall apply for an excavation permit for any Fiber Optic Network Facility construction or maintenance work requiring traffic control within said Public Right-of-Way or public utility or service easements. COMPANY shall furnish detailed plans of the work

and other such information as required by CITY's Community Development Director or his or designee and shall pay all processing, field marking, engineering, and inspection fees prior to issuance of said permit in accordance with the rates in effect at the time of payment. All Fiber Optic Network Facility construction within said Public Right-of-Way or public utility or service easements shall be installed in accordance with the Pleasanton Municipal Code, CITY's Standard Provisions, and as further provided for in the provisions of this Agreement.

17. The excavation permit shall set forth the description of the Fiber Optic Network Facilities to be installed and said Public Right-of-Way or public utility or service easements on which such facilities are to be located. CITY shall establish construction-related conditions and specifications, and these shall also be set forth in the excavation permit.

PERFORMANCE BOND

18. Prior to the issuance of an excavation permit, COMPANY shall provide CITY with a performance bond naming CITY as obligee in the amount equal to one hundred percent (100%) of the value of the work to be performed by or on behalf of COMPANY within and affecting said Public Right-of-Way to guarantee and assure the faithful performance of COMPANY's obligations under this Agreement. CITY shall have the right to draw against the performance bond in the event of a default by COMPANY or in the event that COMPANY fails to meet and fully perform any of its obligations. The form of the performance bond shall be approved by CITY. The performance bond shall remain in full force for one (1) year after the work to be performed is completed, inspected, accepted, and released by CITY's Community Development Director or his or designee.

DAMAGE TO FACILITIES IN PUBLIC RIGHT-OF-WAY

19. COMPANY shall be responsible for any damage to CITY street pavements, existing utilities, curbs, gutters, sidewalks due to its installation, maintenance, repair, or removal of its Fiber Optic Network Facilities in said Public Right-of-Way and public utility or service easements, and shall repair, replace, and restore in kind the said damaged facilities at its sole expense.

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

PARTICIPATION WITH OTHER UTILITIES

21. COMPANY agrees to cooperate in the planning, locating, and constructing of its Fiber Optic Network Facilities in utility joint 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 exist in an area.

RECORDS AND FIELD LOCATIONS

22. COMPANY shall maintain accurate maps and improvement plans of said Fiber Optic Network Facilities located within CITY. COMPANY shall provide, upon demand of CITY's Public Works Director and deliver to the office of CITY's Community Development Department free of charge, and to other third parties interested in performing work within Public Right-of-Way for a reasonable charge upon request, within thirty (30) days after such demand, such maps and plans as may be required to show in detail the exact location, size, depth, and description of all COMPANY Fiber Optic Network Facilities installed within said Public Right-of-Way. COMPANY shall, at its sole cost and expense, expose by potholing to a depth of 1' 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.

23. COMPANY 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 State of California Government Code, as it now reads or may herein after be amended.

HOLD HARMLESS AND INDEMNIFICATION

24. COMPANY, jointly and severally, for itself, its successors, agents, contractors, and employees, agrees to indemnify, defend (with counsel reasonably acceptable to CITY), and hold harmless CITY, its elective and appointive boards, commissions, officers, employees, agents, and volunteers, and any successors to CITY's interest from and against any and all claims, demands, losses, damages, liabilities, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense (collectively, the "Losses") arising directly or indirectly out of the activities or Facilities described in this Agreement and/or the installation, operation, removal, and/or repair of the improvement and Facilities thereto, provided, however, COMPANY shall not indemnify CITY, its officers, employees, and agents and any successors to CITY's interest for losses arising directly or indirectly, from CITY's sole acts of negligence, omissions, or willful misconduct. CITY shall not be responsible for any damages, losses, 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 by CITY of a permit or approval to any third party or any interruption in service.

25. COMPANY, for itself and its successors and assigns, hereby waives all claims and causes of action, whether now existing or hereafter arising, against CITY or its officers, agents, or employees, for damages, physical or otherwise, to any of the facilities covered by this Agreement from any cause whatsoever. Under no circumstances shall either party be liable to the other party or otherwise responsible for any loss of service downtime, lost revenue or profits or third-party damages.

INSURANCE

26. Insurance.

a. Commercial General Liability/Automobile Liability Insurance:

COMPANY shall obtain and maintain Commercial General Liability insurance and Automobile Liability insurance in a minimum amount of Two Million Dollars (\$2,000,000) per occurrence. If a general aggregate limit is used, either the general aggregate limit shall apply separately to this contract or the general aggregate limit shall be twice the required occurrence limit. COMPANY's insurance coverage shall be written on an occurrence basis.

b. Workers' Compensation Insurance:

COMPANY shall obtain and maintain statutory Workers' Compensation insurance and Employer's Liability insurance in a minimum amount of One Million Dollars (\$1,000,000) per accident.

c. Acceptability of Insurers: Insurance is to be placed with insurers with a current *Best Rating* of A:VII unless otherwise acceptable to CITY.

d. Verification of Coverage: Insurance, deductibles, or self-insurance retentions shall be subject to CITY's approval. Original Certificates of Insurance with endorsements shall be received and approved by CITY before work commences, and insurance must be in effect for the duration of the contract. The absence of insurance or a reduction of stated limits shall cause all work on the project to cease. Any delays shall not increase costs to CITY or increase the duration of the project.

e. Other Insurance Provisions:

(1) The City of Pleasanton, its officers, officials, employees, and volunteers are to be covered as additional insured by Endorsement CG 20 10 11 85 or other endorsement approved by CITY's City Attorney for Commercial General and Automobile Liability coverage.

(2) For any claims related to this project, COMPANY's insurance coverage shall be primary and any insurance or self-insurance maintained by CITY, its officers, officials, employees, and volunteers shall not contribute to it.

(3) COMPANY shall provide thirty (30) day notification to CITY in the event of cancellation or modifications of limits to the stipulated coverage.

(4) In the event COMPANY employs subcontractors as part of the work covered by this Agreement, it shall be the responsibility of COMPANY to ensure that all subcontractors comply with the same insurance requirements that are stated in this Agreement.

(5) Approval of the insurance by CITY or acceptance of the Certificate of Insurance by CITY shall not relieve or decrease the extent to which COMPANY may be held responsible for payment of damages resulting from COMPANY's services or operation pursuant to this Agreement, nor shall it be deemed a waiver of CITY's rights to insurance coverage hereunder.

(6) If, for any reason, COMPANY fails to maintain insurance coverage that is required pursuant to this contract, the same shall be deemed a material breach of contract. CITY, at its sole option, may terminate this contract and obtain damages from COMPANY resulting from said breach. Alternately, CITY may purchase such required insurance coverage, and without further notice to COMPANY, CITY may deduct from sums due to COMPANY any premium costs advanced by CITY for such insurance.

ASSIGNMENT

27. a. COMPANY shall not assign or transfer any interest in this Agreement nor the performance of any of COMPANY's obligations hereunder, without the prior written consent of CITY, and any attempt by COMPANY to so assign this Agreement or any rights, duties, or obligations arising hereunder shall be void and of no effect.

b. Notwithstanding Section 31.a, COMPANY may assign the rights granted herein, in whole or in part, to a parent, successor, subsidiary, or affiliate of COMPANY, 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 acknowledge Agreement in writing within ninety (90) days of assignment.

28. 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.

SEVERABILITY

29. 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.

THIRD-PARTY MODIFICATIONS

30. This Agreement shall be subject to such changes or modifications as may be required or authorized by any regulatory commission in the exercise of its lawful jurisdiction.

ENFORCEMENT

31. Failure to comply with the terms and conditions of this Agreement may, at CITY's sole discretion, result in withholding issuance of any new excavation permits, termination of this Agreement, and/or enforcement pursuant to Title 1 of the Pleasanton Municipal Code.

TERMINATION

32. This Agreement shall terminate ten (10) years from the effective date. This Agreement may be terminated by CITY upon approval of the City Council and thirty (30) days written notice to COMPANY if CITY reasonably 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 COMPANY'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 COMPANY to relocate the said portion in accordance with Section 11 of this Agreement. This Agreement may be terminated by CITY for failure, neglect, or refusal by COMPANY to fully and promptly comply with any and all of the conditions of this Agreement, or for nonuse in accordance with Section 13 herein, upon thirty (30) days written notice, unless COMPANY 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 COMPANY.

33. This agreement may be amended in writing and signed by both parties. Upon termination of this Agreement, and upon written request by CITY, COMPANY, 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 Public Right-of-Way and restore said Public Right-of-Way as set forth in the Removal and Relocation provisions of this Agreement. Should COMPANY in such event fail, neglect, or refuse to make such removals or restoration within one hundred eighty (180) 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 COMPANY, which actual expense, including administrative and legal costs, COMPANY agrees to pay to CITY upon demand.

NOTICE

34. COMPANY's Network Operations Center shall be available to CITY staff 24 hours a day, 7 days a week, regarding problems or complaints resulting from the facilities installed pursuant to this Agreement and may be contacted by telephone at:

(866) 678-4841

COMPANY shall designate a person in California who is authorized to accept service of process on behalf of COMPANY regarding such problems or complaints.

35. 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 at:

City of Pleasanton
P.O. Box 520
Pleasanton, CA 94566
Attention: Community Development Director

To COMPANY at:

opticAccess LLC
533 Airport Boulevard, Suite 400
Burlingame, CA 94010

///

///

///

///

///

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate on the date and year first written herein.

"CITY":
CITY OF PLEASANTON,
a California municipal corporation

By: 
Nelson Fialho
City Manager

"COMPANY":
OPTICACCESS LLC,
a Nevada limited liability company

By: 
Jeffrey Yount

Title: Chief Operating Officer/Manager

APPROVED AS TO FORM:

 
Jonathan Lowell
City Attorney