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MEMORANDUM

DATE: November 12, 2019

TO: City Council

FROM: R. David Jackson, Assistant City Attorney

THROUGH: Kelly M. Fernandez, City Attorney

SUBJECT: First Amendment to Settlement Agreement with Fibernet Direct LLC

Attached please find a First Amendment to Settlement Agreement between the City and Fibernet Direct Florida LLC ("Fibernet").

Factual Background

This dispute involves the City's fiber optic cable network and certain fiber optic cables installed in the City's conduit. Notably, when the City's conduit was originally constructed, a portion was not completed leaving a gap of approximately 190 feet. On June 26, 2007, the City entered into a License Agreement ("License Agreement") with The Ultimate Connection, L.C. d/b/a Daystar Communications ("Daystar"). Pursuant to the License Agreement, the City agreed that Daystar would construct 190 feet of conduit and, in exchange, Daystar was licensed to install an inner-duct and fiber optic cable within the newly constructed conduit. As required by the License Agreement, Daystar constructed the 190' segment of conduit and thereafter installed an inner-duct and 144-count fiber optic cable (the "Fibers").

In 2012, Birch Communications, Inc. (Birch), entered into an agreement with Daystar concerning the purchase of certain assets of Daystar. Whether the Fibers were part of this transaction was a primary issue of this dispute. In any event, sometime after the Birch-Daystar transaction, the City began to explore the need for more high-speed connectivity and the decision was made to build out the City's network by utilizing the fiber optic conduit network, including the segment constructed by Daystar. However, Daystar's installation of the inner-duct and the Fibers blocked and/or severely limited the ability to insert other cables into the conduit. As such, on June 4, 2013, the City reached out to Birch (Daystar's presumed successor-in-interest) to see if it intended to continue using the Fibers and conduit. In response, Birch sent the City an email confirming that the City could "do what you need to do with the wiring/conduit any time after 8-30-13." Relying on Birch's approval, the City used the existing Fibers and spliced into same to complete its optic conduit network upgrade. The upgrade was completed in August of 2014 and since that time the City has used the upgraded optic conduit network, including the Fibers, to carry out day-to-day communications functions of the City.

In March 2017, Fibernet Direct Florida LLC ("Fibernet") contacted the City alleging that the City had improperly spliced into *its* fiber cable as Fibernet was the company that actually constructed and installed the Fibers for Daystar. Prior to this communication, the City was completely unaware that Fibernet claimed any interest whatsoever in the Fibers or inner-duct/conduit. Over several months, the City and Fibernet attempted to negotiate a resolution regarding the use and ownership of the Fibers. Eventually, Fibernet sent the City an invoice for the City's alleged unauthorized use of the fiber optic network, demanding that the City pay $203,280.00 for past use of the Fibers. When the City did not pay Fibernet's invoice, Fibernet sent the City correspondence noting that if the invoice was not paid within 10 days, then Fibernet would suspend the City's service. Because of the City's dependence on the fiber optic network, the City immediately filed suit and obtained a temporary injunction.

Subsequently, on November 30, 2018, the City and Fibernet entered into a Settlement Agreement whereby the City would pay a settlement amount of $40,000.00 to Fibernet "for the City's use of the Fibers until such time as the Fibers are returned to Fibernet." More specifically, the Settlement Agreement provided the City with a time period of one year to continue to use the Fibers while it installed "additional fiber optic cable, wireless equipment or other alternative devices or services for the exclusive use and ownership by the City as needed to serve the City's communications and information technology needs" (the "Installation").

Status of Current Installation

City staff explored multiple options to accomplish the Installation and ultimately, a wired connection was chosen to provide a higher level of security and resilience while also limiting potential interference with airport equipment. Accordingly, the City entered into an agreement with Comcast Corporation to lease fiber optic cables as an alternate method of wired communication. This lease required months of construction time to locate and reconnect unused fiber optic cables outside of the conduit, as well as to install new equipment on the island and at the City's data center. In addition, this wired communication change required new fiber optic

cables to be installed for Public Works and Public Utilities in a new conduit to be placed under US-41, which required a right-of-way use permit from the Florida Department of Transportation (FDOT).

After several submittals and delays, the City was issued the ROW permit from FDOT on or around November 6, 2019. The fiber optic installer hired by the City can now proceed with having its drilling contractor install the new conduit and fiber optic cables under US-41. However, the delay in obtaining the permit from FDOT made it unlikely that the City will be able to complete the Installation prior to the November 30, 2019, deadline.

First Amendment to Settlement Agreement

Based on the foregoing, City staff contacted Fibernet regarding an extension of time to complete the Installation. Fibernet agreed to provide the City until December 31, 2019, to complete the Installation with no additional payment for use of the Fibers; however, after that date, the City will be required to enter into a Customer Agreement with Fibernet (now Crown Castle Fiber LLC) for use of the Fibers at an agreed-upon monthly rate of $57.00 per fiber/per mile, which equates to $4,389.00 per month for the 77 fibers currently being used by the City. Fibernet has executed the Amendment as it is presented. Accordingly, the attached First Amendment to Settlement Agreement between the City and Fibernet is provided for approval by the City Council and execution by the Mayor.