



08-9265

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300 Meridian Centre  
Rochester, NY 14618

## MASTER FACILITIES AGREEMENT

This Master Facilities Agreement ("Agreement" or "MFA") is entered into on this 21<sup>st</sup> day of August, 2008 ("Execution Date") between FIBER TECHNOLOGIES NETWORKS, L.L.C., a New York limited liability company, having its principal place of business at 300 Meridian Centre, Rochester, New York 14618 ("Lessor") and City of Saratoga Springs having its principal place of business at 474 Broadway, Saratoga Springs, NY, 12866 ("Lessee").

### RECITALS

Lessor is operating fiber optic communication networks in various metropolitan areas throughout the United States, (the "Lessor's System"), and desires to lease to Lessee certain optic fibers within Lessor's System for use by Lessee.

In consideration of the mutual promises set forth below, and for other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, Lessor and Lessee agree as follows:

#### 1. DEFINITIONS.

Unless otherwise defined in this Agreement, the following terms shall have the following definitions:

- 1.1 **Demarcation Point.** A point on one side of which is Lessee's responsibility for liabilities, ensuring connections, and paying for and installing equipment, termed Premise Side the other side of the Demarcation Point shall be termed Network Side.
- 1.2 **Fibers.** Fiber optic strands.
- 1.3 **Lessee Fibers.** The fiber that Lessor is leasing to Lessee and that Lessee may use for the term of this MFA, pursuant to the terms and conditions herein.
- 1.4 **Lessee's System.** The telecommunications facilities owned or controlled by Lessee on the Premise Side of the Demarcation Points.
- 1.5 **Lessor Fibers.** All fibers governed by this MFA other than Lessee Fibers.
- 1.6 **Lessor's System.** All equipment and property owned by Lessor on the Route.
- 1.7 **Route.** The path on which the Fiber will be located as shown in Schedule #1, which will identify the routes along which Lessee Fibers will be located. To the extent more than one geographical route is identified on Schedule #1 hereto (whether on the Execution Date or as later added by amendment of this Agreement), the term 'Route' as used herein shall be deemed to include the plural where appropriate in context.
- 1.8 **Utility Agreements.** Any and all applicable governmental or non-governmental franchises, leases, licenses, rights of way, easements, pole attachment agreements, permits, approvals, orders, consents, contracts, agreements or other rights of any nature pursuant to which the Lessor has or will obtain any rights to own, install or construct, operate, maintain, and replace all or any portion the Lessor's System.

## 2. LEASE

- 2.1 Lease. Lessor hereby leases to Lessee a right to use specific Fibers in the Cable over the Routes as set forth in Schedule #1. From time to time, additional Routes may be leased from Lessor to Lessee by executing a Product Order (see Exhibit A) and appending it to this Agreement. For each Route leased, the Agreement shall thereby be deemed to be amended such that each Route is considered to be a part of and subject to the terms and conditions of this Agreement.
- 2.2 Nature of the Agreement. This Agreement and the leases granted pursuant to Product Orders do not convey any legal title to any real or personal property including the Fibers, the Cable or the System. The Agreement does not include any equipment used to transmit capacity over or to 'light' the Fibers.
- 2.3 Default of a Product Order. Default by either party on one Product Order shall not be deemed a default of any other Product Order.

## 3. TERM

This Agreement shall become effective upon execution by all parties and shall remain in effect until the date, which is ( 5 ) years after the date of Acceptance by Lessee.

## 4. ENGINEERING AND DESIGN

- 4.1 Specifications. The Lessee Fibers shall be consistent with the engineering and design specifications set forth in the Schedule #3. These Specifications were agreed to by the Parties and are intended to ensure that the Parties design, engineer, construct, maintain, and use the Fiber consistently with applicable laws, regulations and in a manner so intended not to conflict physically or otherwise interfere with other users of the Lessor System.
- 4.2 Lessee System. Lessee shall design, at Lessee's sole cost and expense, all equipment that will be used to connect Lessee Fibers to Lessee's System or that will be located on the Premise Side of the Demarcation Point, which design shall be compatible with the Specifications and subject to the approval of Lessor prior to installation by Lessee.

## 5. INSTALLATION AND CONSTRUCTION

- 5.1 Lessor to Complete Route. Subject to its rights and obligations under the Utility Agreements, Lessor shall perform, or cause to be performed, such work, if any, at its expense, as may be required for placement of the Lessee Fibers on or in the Routes as set forth in Schedule #1 in accordance with Lessor's schedule of construction. Lessor shall use all commercially reasonable efforts to place the Lessee Fibers along the Routes set forth in the Route Description.
- 5.2 Completion. Lessor will provide notice of completion when the network has been placed and tested between the points of Demarcation. In the event that the Lessee orders multiple point-to-points under a single contract, each point-to-point with the same A-side and Z-side address will be considered a single Product Order and will follow the acceptance process independent from the other point-to-point Product Orders. In the event that Lessor cannot complete the network to the Demarcation point due to a delay caused by the customer or third party then Lessor will provide notice of completion for the portions unaffected by such delay.

5.3 Acceptance By Lessee. Lessee will have fifteen (15) business days from receipt of notification of the date of completion by Lessor of construction to test the Lessee Fibers to ensure that they conform in all material respects to the Specifications. Lessee shall be deemed to have accepted ("Accept(ed)") such Lessee Fibers if it fails to notify Lessor otherwise within such fifteen (15) business day period. Acceptance ("Acceptance") of the License Fibers shall be deemed to have occurred on the earlier of (i) completion of testing and acceptance of Lessee Fibers by Lessee, or (ii) the first date upon which Lessee Fiber conforms in all material respects with the Specifications ("Acceptance Date").

## 6. MAINTENANCE AND REPAIR

6.1 Lessor's Rights and Obligations. Lessor shall have the sole obligation and right to maintain and repair the Lessor's System including, without limitation, Lessee Fibers and Lessor Fibers in a good operating condition and pursuant to the Specifications.

6.2 Limitation of Lessee. Lessee will not, by itself or through any agent, take any action which damages or interferes or could reasonably be assumed would damage or interfere with Lessor's System, and if it does so Lessor shall have the right, upon prior notice to Lessee, if practicable, to take whatever action it deems necessary or appropriate to repair and restore Lessor's System or prevent damage to Lessor's System, and Lessee shall indemnify and hold Lessor harmless for its damages pursuant to Section 18 below.

6.3 Inspection. Lessor shall have the right to inspect the Lessee's System and Lessee's use of the cable during normal business hours upon twenty four (24) hours notice to Lessee or immediately in the event of any emergency situations. The right to inspect shall include the right of access to any property owned, leased or otherwise controlled by the Lessee, upon prior notice to Lessee, if practicable.

6.4 Changes to Specifications. Lessor may make such changes and alterations to the Specifications, as set forth in schedule 3, as Lessor determines are necessary or advisable in its sole discretion provided that such changes or alterations do not (1) alter the number of the Lessee Fibers, (2) alter the location of the Demarcation Points, (3) alter the Cable Parameters, or (4) impair the use of the Lessee Fibers under this Agreement, unless otherwise mutually agreed. In the event that Lessor makes any changes or alterations permitted by this section, such changes or alterations shall not affect or change the Use Charge or any other amounts payable by the Lessee under this Agreement.

6.5 Service Interruption. Notwithstanding any other provision of this Agreement, in the event of any interruption of use by Lessee of any segment of the Lessee Fibers, which materially affects Lessee's provision of services and which is the result of a severance of, physical damage to, or degradation of the Lessee Fibers, and which is not caused by (1) Lessee's willful misconduct or negligence, or (2) a Force Majeure (as defined in Section 15), the Lessor's sole liability and obligation shall be to provide credits against Lessee's monthly payment of Use Charges for that month in which the interruption of use occurred which credit shall be equal to 2% of the monthly Use Charge for Lessee Fibers within the affected Segment of the Route which is interrupted for every cumulative hour of service interruption beginning with the fifth hour after proper notification of the interruption by Lessee up to a maximum of 100% of the Use Charge for such interrupted Segment during such month. The remedy provided in this Section shall be Lessee's sole and exclusive remedy for outages or interruptions of service. The foregoing notwithstanding, Lessee shall have no right to any credit, reimbursement or any other payment to the extent such service interruption or outage is caused in whole or in part by any act or omission of Lessee or by Lessee System, or in the event that the Lessee has breached any of the material provisions of the Agreement at the time of such service interruption.

- 6.6 Restoration. Lessor will respond to Lessee within two hours of proper notification by Lessee of possible damaged Fiber(s), and if necessary dispatch a technician to the location of the possibly damaged Fiber(s). The technician will assess the situation and use commercially reasonable efforts to remediate the problem within a commercially reasonable time frame.

## 7. TITLE, USE AND TAXES

- 7.1 Title. Lessor retains all rights, title and interest in Lessor's System subject only to the lease provided to Lessee pursuant to this Agreement. Neither the grant of use or other provision of the Lessee Fibers or any other facilities or services by Lessor to Lessee nor the payment by Lessee of the fees or charges therefore to Lessor shall constitute, create, or vest any easement or any other ownership or property rights in the Lessee Fibers or Lessor's System.
- 7.2 Use By Lessee. Lessee acknowledges and agrees that Lessee and or affiliated entities, which control or are controlled by the Lessee will not permit or provide access to or use of the Lessee Fibers to any third party whether by sublease, License, sublicense, sale, resale, or any other form of transfer, disposition or agreement without the express written consent of Lessor, which consent may be given or withheld in Lessor's sole discretion.
- 7.3 Taxes. Lessee and Lessor agree that Lessee will be responsible for paying any and all existing or future sales, use, excise, franchise or other transfer or transactional taxes imposed or levied by any federal, state or local taxing authority on the Use Charges and/or other payments made by Lessee to Lessor.

Use Charges and/or other fees referred in this agreement do not include taxes. Applicable taxes will be invoiced by Lessor to Lessee unless Lessee provides Lessor with a valid and applicable tax exemption certificate before such invoice is generated.

- 7.4 Reversion. Lessee's right to use the Lessee Fibers shall revert to Lessor upon termination of this MFA.

## 8. GOVERNMENT APPROVALS, PERMITS, AND CONSENTS

- 8.1 Lessee Obligations. Except as provided in Section 8.2, Lessee at its sole cost and expense, shall obtain and maintain any and all necessary permits, licenses, easements, franchises and approvals that may be required by federal, state or local law, statute, regulation or ordinance as may now or in the future be applicable to its use of the Lessee Fibers under the terms and conditions of this MFA. Lessee represents and warrants that it will use the Lessee Fibers, or cause the Lessee Fibers to be used, in full compliance with all federal, state and local applicable government laws, statutes, rules, regulations, codes and ordinances and all applicable franchises, rights of way, leases, Licenses, contracts and other material obligations to third party with respect to or relating to the Lessor System and in full compliance with the terms and conditions of this Agreement.
- 8.2 Lessor's Obligations. During the term of this MFA, Lessor shall obtain, or cause to be obtained, all approvals and consents that may be required from all federal, state, and local authorities regarding the ownership, installation, maintenance, or replacement of the cable in which the Lessee Fibers is located upon the Route. Lessor represents and warrants that it is and will continue to be in material compliance with all Utility Agreements and any and all applicable government codes, ordinances, laws, rules and regulations relating to its ownership, control, operation, and/or maintenance of the Cable.
- 8.3 This Section 8 shall survive any termination or expiration of this MFA.

## 9. LIENS

- 9.1 Lessee acknowledges that it has no title to and cannot in any way encumber the Lessor's System without prior notice to and consent of Lessor which consent may be granted or withheld in Lessor's sole discretion.
- 9.2 If, notwithstanding Section 9.1, any property of Lessor or its affiliates becomes encumbered by any unauthorized liens, claims, or other encumbrance as a result of any act or omission of Lessee, Lessee shall promptly and to the fullest extent permitted by law take all actions necessary to remove such encumbrances from Lessor's and its affiliates' property, and Lessor shall have the right, in addition to all other available legal, equitable, and administrative rights and remedies, to withhold any payment due Lessee until such encumbrance is removed; in addition, Lessee shall: (1) within forty-eight (48) hours post a bond in an amount equal to the value of the encumbrance; (2) discharge the encumbrance as soon as possible, but no later than thirty (30) days; and (3) indemnify and hold harmless Lessor and its affiliates and their officers, directors, employees, agents, servants, and assigns from said encumbrance.
- 9.3 This Section 9 shall survive the termination or expiration of this MFA.

## 10. REPRESENTATIONS AND WARRANTIES

- 10.1 Each of the Parties represents and warrants that it has full authority to enter into and perform this MFA, that this MFA does not conflict with any other document or agreement to which it is a party or is bound, and that this MFA is fully enforceable in accordance with its terms, and that each is an entity validly existing and in good standing under the Laws of the states in which they are authorized to do business.

## 11. DISCLAIMERS

- 11.1 OTHER THAN AS EXPRESSLY SET FORTH IN THIS MFA, LESSOR MAKES NO WARRANTIES, REPRESENTATIONS, COVENANTS OR GUARANTEES IN CONNECTION WITH THIS MFA, OR THE FIBER WHETHER EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THIS SECTION 11 SHALL SURVIVE ANY TERMINATION OR EXPIRATION OF THIS MFA. LESSOR MAKES NO REPRESENTATIONS WITH RESPECT TO THE ANY FIBERS EXCEPT AS SPECIFICALLY SET FORTH HEREIN, LESSOR SHALL NOT HAVE ANY LIABILITY WHATSOEVER FOR, OR IN CONNECTION WITH FIBER FAILURE UNLESS SUCH FAILURE IS CAUSED BY THE WILLFUL MISCONDUCT OF LESSOR. LESSOR SHALL HAVE NO RESPONSIBILITY FOR LESSEE'S SYSTEM.

## 12. INSURANCE

12.1 Insurance. Prior to execution of this contract, each of the Parties, at its own expense, shall provide and maintain in force during the term of this MFA insurance in forms acceptable to the other Party, with the following minimum levels of coverage:

- Commercial general liability and automobile liability  
\$ 2,000,000 per person per occurrence
- Property damage  
\$ 2,000,000 per occurrence
- Umbrella/Excess Coverage  
\$5,000,000
- Employer's liability:  
\$500,000 per occurrence,
- Workers compensation:  
Statutory limits, in accordance with the laws of the state in which the construction is to take place.

## 13. BREACH

13.1 Definition. If Lessee or Lessor shall take such action which is prohibited, in any material respect, by the terms of this Agreement, or fail to perform (whether any such failure shall arise as the result of the voluntary or involuntary action or inaction of such party), in any material respect, any of its obligations set forth in this Agreement, including without limitation any violation of law (which is material and which adversely affects either Party's obligations under the Agreement), and such prohibited action or failure to perform is not excused by any provision of this MFA and continues un-remedied for a period of thirty (30) days following written notice from the non-breaching Party or such shorter period as may apply under law or no period if such prohibited action or failure to perform is not susceptible to cure (the "Cure Period"), then such action or failure shall, upon and from the expiration of the applicable Cure Period, if any, constitute a "Breach"; provided, however, if a party has taken such measures to initiate a cure but such remedy will take longer than the applicable Cure Period, no breach shall be deemed to have occurred as long as such Party is using its best efforts to promptly cure such breach. Such Breach shall not be deemed to occur where such Breach is directly or primarily caused by the actions of another Party. The foregoing notwithstanding any failure to make a payment when due hereunder shall constitute a Breach 10 days after written notice.

13.2 Consequences. In the event of a Breach, the non-breaching Party may, in its sole discretion, terminate this MFA in accordance with Section 13.5 and have no further obligations or liability hereunder; except only that each Party shall pay the other Party any amounts due, owing and unpaid by such Party. The non-breaching Party shall also have the right to pursue any and all rights it may have against the breaching Party now or hereafter under the law, subject to the express limitations contained in this MFA, including without limitation, the right to seek injunctive relief to prevent the breaching Party from continuing to Breach its obligations under this MFA. The foregoing notwithstanding in the event of termination of the MFA by Lessor as a result of a Breach of this MFA by Lessee all sums due and owing Lessor by Lessee for the remainder of the Term shall at once become all due and payable by Lessee to Lessor.

- 13.3 Limitation of Liability. ANYTHING CONTAINED HEREIN TO THE CONTRARY NOTWITHSTANDING, IN NO EVENT SHALL LESSOR BE LIABLE TO THE LESSEE OR TO ANY THIRD PARTY AFFILIATED, CONNECTED WITH OR DOING BUSINESS WITH LESSEE WHETHER IN CONTRACT, TORT, OR OTHERWISE, INCLUDING STRICT LIABILITY, FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OR ANY LOST BUSINESS DAMAGES IN THE NATURE OF LOST REVENUES, PROFITS AND/OR GOODWILL REGARDLESS OF THE FORESEEABILITY THEREOF.

ANYTHING CONTAINED HEREIN TO THE CONTRARY NOTWITHSTANDING, THE TOTAL LIABILITY OF EITHER PARTY FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH AN ORDER FORM (EXCLUDING EARLY TERMINATION CHARGES (AS DEFINED IN THE RELATED SUPPLEMENT)) IS LIMITED TO AN AMOUNT EQUAL TO TWO TIMES THE TOTAL CHARGES PAYABLE BY CUSTOMER DURING THE TERM SET FORTH THEREIN.

- 13.4 Failure To Enforce. The failure of any party to enforce or insist upon compliance with any of the terms or conditions of this MFA, or to give notice or declare this MFA or any authorization granted hereunder, terminated shall not constitute a general waiver or relinquishment of any term or condition of this MFA, but such term or condition shall be and remain at all times in full force and effect.
- 13.5 Early Termination of Agreement. This Agreement may be terminated prior to the expiration of the Term by the non-breaching Party following the Breach of this Agreement by the other Party or by the other Party if a Party (1) consents to the appointment of, or is taken in possession by, a receiver, trustee, custodian or liquidator of a substantial part of its assets, (2) files a bankruptcy petition in any bankruptcy court proceeding, (3) answers, consents or seeks relief under any bankruptcy or similar law or fails to obtain a dismissal of an involuntary petition within 60 days of filing, (4) admits in writing of its inability to pay its debts when due, (5) makes a general assignment for the benefit of creditors, (6) is the subject of an involuntary proceeding seeking to adjudicate that Party bankrupt or insolvent, or (7) seeks reorganization, arrangement, adjustment, or composition of it or its debt under any law relating to bankruptcy, insolvency or reorganization or relief of debtors.

## 14. CHARGES

- 14.1 Charges. Lessee shall pay to Lessor for the lease of the Lessee fibers hereunder a recurring charge ("Recurring Charge"), and an up-front charge ("Upfront Charge"). (Recurring Charge / Upfront Charge are collectively known as Charge(s)). The Charges are set forth in Schedule #2 annexed hereto.
- 14.2 When Due. Lessee shall pay the Charges as follows:
- Upon execution of a MFA or Product Order, Lessor shall invoice Lessee for fifty percent (50%) of the Up-front Charge.
  - Following the Acceptance Date of the Route, Lessor shall invoice Lessee for the remaining fifty percent (50%) of the Up-front Charge(s).
  - Following the Acceptance Date of the Route, Lessor shall invoice Lessee for the first payment of any Recurring Charges, which shall be pro-rated for the first month based on the number of days remaining in the calendar month, and shall also include the first full month's Recurring Use Charges. Such invoice will be sent on the first (1<sup>st</sup>) day of the next month and thereafter for each successive month.

- (d) Lessor shall invoice Lessee for any annual Recurring Use Charges (such as maintenance charges), which shall be pro-rated for the first year based upon the number of days remaining in the calendar year following Acceptance or commencement of commercial use. Thereafter, Lessor shall invoice Lessee for the full annual Recurring Use Charges for such Lessee Fibers on the first (1<sup>st</sup>) day of January of each successive year thereafter.
- (e) All payments due hereunder shall be made within thirty (30) days of invoice.

## 15. FORCE MAJEURE

- 15.1 Force Majeure Events. Neither Lessee nor Lessor shall be liable for any failure or delay in performing its obligations hereunder, or for any loss or damage resulting therefrom, due to the following Force Majeure Events:
  - (a) fire, flood, strike or other labor difficulty, natural disasters, acts of God or public enemy, act of war restraint or hindrance by any governmental or regulatory authority including, without limitation, unfavorable actions or failures to act of or by such authorities (except when the result of noncompliance with Section 13), war, insurrection, riot, injunction, or
  - (b) any other causes beyond the Parties' reasonable control, or causes beyond the reasonable control of their suppliers.
- 15.2 Abatement of Force Majeure. To the extent practicable, both Parties shall be prompt in restoring normal conditions, establishing new schedules and resuming operations as soon as the event causing the failure or delay has ceased. Lessee shall promptly notify Lessor of any delay and its effect on the performance by Lessee. Lessor shall promptly notify Lessee of any delay in Lessor's performance.
- 15.3 Suspension Pending Force Majeure. If a Force Majeure Event should occur, then, the Parties' performance of this MFA shall be suspended for so long as such Force Majeure Event continues. At the conclusion of a Force Majeure Event, the period of time so suspended shall be added to the dates, schedules and other performance-related matters under this MFA.

## 16. PROPRIETARY INFORMATION

- 16.1 Obligation to Maintain as Confidential. Each Party acknowledges that in the course of the performance of this MFA it may have access to Proprietary Information of the other Party. All Proprietary Information shall be marked as "confidential" with an appropriate legend, marking, stamp or other obvious written identification prior to disclosure. All Proprietary Information in tangible form of expression, which has been delivered (or thereafter created by copy or reproduction pursuant to this MFA) shall be and remain the property of the person, which is disclosing such Proprietary Information (the "Disclosing Party"). Anything to the contrary contained herein notwithstanding, the definition of Lessor Proprietary Information shall be deemed to include the Utility Agreements.



## 16.2 Obligations Concerning Proprietary Information

- (a) General Restrictions. Upon receiving Proprietary Information such Party (the "Receiving Party") shall keep in strict confidence and not disclose to any person (with the exception of employees, officers, directors, representatives, and affiliates of the Receiving Party, to the extent each such person or entity has a need to know in connection herewith) any of the Disclosing Party's Proprietary Information except as otherwise provided by the terms and conditions of this MFA. The Receiving Party shall not use such Proprietary Information except for the purposes identified herein without the prior written approval of the Disclosing Party. The Receiving Party shall be solely liable for any breach of this Section 17 to the extent caused by its or its affiliates' employees, officers, directors, and affiliates.
- (b) Exceptions. The Receiving Party shall not be precluded from, nor liable for, disclosure or use of any Proprietary Information if:
- i. the Proprietary Information is in or enters the public domain, other than by a Breach of this MFA;
  - ii. the Proprietary Information is known to the Receiving Party at the time of first receipt, or thereafter becomes known to the Receiving Party prior to or subsequent to such disclosure without similar restrictions from a source other than the Disclosing Party, as evidenced by written records;
  - iii. the Proprietary Information is developed by the Receiving Party independently of any disclosure under this MFA as evidenced by written records; or
  - iv. the Proprietary Information is disclosed more than two (2) years after the date of first receipt of the disclosed Proprietary Information; or two (2) years after the Term whichever occurs later;
  - v. disclosure of the Proprietary Information is compelled by a governmental authority, including, but not limited to any court or regulatory body, whether or not a protective order is sought or granted;
  - vi. the Disclosing Party consents to the disclosure or use of the Proprietary Information; or
  - vii. the Receiving Party has a reasonable belief that disclosure of the Proprietary Information is necessary for public safety reasons and has attempted to provide as much advance notice of the disclosure as is practicable.
- (c) Disclosures. The disclosure of Proprietary Information hereunder shall not be construed as granting any right of ownership in said Proprietary Information. Notwithstanding any other provision of this Agreement, Grantor may reasonably disclose the terms and conditions of this Agreement without the prior consent of Licensee in connection with any borrowing or financing activity or Grantor, its subsidiaries or affiliates.
- (d) Protective Orders. The Receiving Party shall give notice to the Disclosing Party of the commencement of any proceeding or issuance of any order or mandate by any governmental agency or tribunal to compel the disclosure of Proprietary Information no later than twenty four (24) hours after the Receiving Party acquires knowledge that such proceeding, order or mandate compels the disclosure of Proprietary Information. The Disclosing Party shall have the right at its own expense, to apply for a protective order against the disclosure of such Proprietary Information either in its own name or that of the Receiving Party and the Receiving Party shall fully cooperate with the Disclosing Party in any such effort to obtain a protective order.

16.3 This Section 16 shall survive any termination or expiration of this MFA in accordance with this Section's terms.

## 17. PUBLICITY AND ADVERTISING

- 17.1 Limitations. In connection with this MFA, neither Party shall publish or use any advertising, sales promotions, or other publicity materials that use the other Party's (or its affiliate's) logo, trademarks, or service marks or name without the prior written approval of the other Party.
- 17.2 Exceptions. This Section 17 shall not apply to reasonably necessary disclosures in or in connection with court or regulatory filings or proceedings, financial disclosures which in the good faith judgment of the disclosing Party are required by law or regulatory authority, or disclosures that may be reasonably necessary in connection with the performance of this MFA.

## 18. INDEMNIFICATION

- 18.1 Mutual Indemnification. Subject to the limitations of liability set forth in this MFA, each Party agrees to indemnify, hold harmless, and defend the other Party, its subsidiaries and affiliates, and their respective officers, directors, employees, attorneys, successors and assigns, from and against any loss, damages, claims, suits, or causes of action for damages, including reasonable attorney's fees, which may arise out of: (a) any injury to or death of any person and damage to property related to activities arising out of this MFA to the extent such injury, death or damage is caused by the negligent acts or omissions or willful misconduct of the indemnifying Party or its principals, employees, agents, or invitees, or by its equipment; (b) the indemnifying Party's violation of applicable federal, state or local statutes, regulations, ordinances or orders; (c) the indemnifying Party's Breach of this MFA; or (d) infringement or misappropriation by a Party of any intellectual property rights under this Agreement.
- 18.2 Indemnification By Lessee. Subject to the limitations of liability set forth in this MFA, Lessee agrees to indemnify, hold harmless, and defend the Lessor, its subsidiaries and affiliates, and their respective officers, directors, employees, attorneys, successors and assigns, from and against any loss, damages, claims, suits, or causes of action for damages, including reasonable attorney's fees, which may arise out of the use by Lessee of the products or services leased by Lessee hereunder, including without limitation, defamation, libel, slander, obscenity, pornography, or violation of the rights of privacy or publicity, or spamming or any other tortious or illegal conduct.
- 18.3 Indemnification Procedures. Each Party shall give prompt notice of any claim for which indemnification is or shall be sought under this Section 20 and shall cooperate and assist the indemnifying Party in the defense of the Claim. The applicable Party shall bear the cost of and have the right to control the defense and shall have the right to select counsel after consulting with the other Party.
- 18.4 Survival. This Section 18 shall survive any termination or expiration of this MFA.

## 19. ASSIGNMENT

- 19.1 Lessor's and Lessee's Right to Assign: Subject to the limitations on use of the Fibers by Lessee set forth in this MFA either Party may assign, or in any other manner transfer its rights, privileges or obligations under this MFA without the prior consent of the other Party, provided that upon any such assignment, or transfer (i) the assignee or transferee shall expressly agree to be bound by all of the provisions of this MFA, and (ii) the assigning or transferring Party shall remain jointly and severally liable for the performance of its obligations under this MFA unless released in writing by the other Party to this MFA.
- 19.2 Lessor's Right to Pledge or Encumber MFA and System. Lessor shall have the right at any time, without the prior consent of Lessee, to mortgage, pledge, grant a security interest in, assign or transfer its interest in this MFA and/or any of Lessor's System in connection with any borrowing or financing activity of



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Lessor, and the rights of Lessee granted under this MFA shall be subject and subordinate to the lien of any mortgage, pledge, security interest or assignment now in place or hereafter granted by Lessor.

19.3 Program Managers. Each Party shall designate a Program Manager. Whenever either Party is entitled to approve a matter, the Program Manager for the Party responsible for the matter shall notify the Program Manager of the other Party of the nature of such matter.

19.4 Form and Address. All notices, invoices and other communications from either Party to the other hereunder shall be in writing and shall be deemed received (i) upon actual receipt when personally delivered, (ii) upon acknowledgment of receipt if sent by facsimile, (iii) upon the expiration of the third business day after being deposited in the United States mails, postage prepaid, certified or registered mail, or (iv) upon the expiration of one business day after being deposited during the regular business hours for next-day delivery and prepaid for overnight delivery with a national overnight courier company, addressed to the other Party as follows:

a. As to Lessor:

Fiber Technologies Networks, L.L.C.  
300 Meridian Centre  
Rochester, New York 14618  
Attn: General Counsel

b. As to Lessee:

City of Saratoga Springs  
474 Broadway  
Saratoga Springs, NY, 12866



phone 585-697-5100  
fax 585-442-9709  
300 Meridian Centre  
Rochester, NY 14618

Each Party may change its addresses by giving the other Party notice thereof in conformity with this Section 19.4. Any payments made under this MFA, if made by mail, shall be deemed to have been made on the date of receipt thereof.

19.5 Damage and Outage Notification. In the event that the Cable is damaged for any reason, the Party discovering such damage shall notify the other Party of said damage by telephone at:

a. As to Lessor:

FT Network Operations  
300 Meridian Centre  
Rochester, NY 14618  
(800) 497-5578

b. As to Lessee:

City of Saratoga Springs  
474 Broadway  
Saratoga Springs, NY, 12866  
(518) 587-3550

These are 24 hours, 7 day per week emergency notification numbers. Calls shall be directed to the Supervisor on Duty, and the caller should be able to provide the following information:

- i. Name of company making report;
- ii. Location reporting problem;
- iii. Name of contact person reporting problem;
- iv. Telephone number to call back with progress report;
- v. Description of the problem in as much detail as possible;
- vi. Time and date the problem occurred or began; and
- vii. If appropriate, a statement that an emergency exists and that a problem presents a threat to the property of Lessor, Lessee or a Third Party.

Should the damage result in an outage of service or need for emergency repair, procedures for notification and escalation will be followed as set forth at time of implementation.

## 20. COUNTERPARTS

This MFA may be executed in several counterparts, each of whom shall be deemed an original, and all such counterparts together shall constitute but one and the same instrument. This MFA may also be executed via counterpart facsimiles upon (a) the telecopy by each Party of a signed signature page thereof to the other Party, with return receipt by telecopy requested and received and (b) the Parties' agreement that they will each concurrently post, by overnight courier, a fully executed original counterpart of the MFA to the other Party.



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**21. APPLICABLE LAW**

This MFA shall be governed by and construed in accordance with the laws of the State of New York, without reference to any choice of law rules.

**22. PRIOR AGREEMENTS; MODIFICATIONS**

This MFA and the Exhibits hereto constitute the entire agreement between the Parties with respect to the subject matter hereof, and supersede all previous understandings, commitments or representations concerning the subject matter.

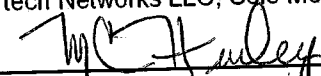
**23. BINDING EFFECT**

This MFA shall be binding upon and inure to the benefit of the parties hereto, their permitted successors and assigns.

IN WITNESS WHEREOF, the undersigned have executed this MFA as of the date first above written.


**FIBER TECHNOLOGIES NETWORKS, L.L.C.**

By: Fibertech Networks LLC, Sole Member

By: 

Date: August 19, 2008

Lessee: CITY OF SARATOGA SPRINGS

By:  , MAYOR

By: \_\_\_\_\_  
Date: August 21, 2008



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**EXHIBIT A - PRODUCT ORDER # 001**

**I. CONTACT INFORMATION**

<b>LESSOR ADDRESS</b>		<b>LESSEE ADDRESS</b>	
Fiber Technologies Networks, L.L.C. 300 Meridian Centre Rochester, New York 14618		Lessee Name City of Saratoga Springs address 474 Broadway address Saratoga Springs, NY, 12866	
<b>CONTACT: Lance Allen</b>	<b>PHONE: 845 331-4837</b>	<b>CONTACT: Kevin Kling</b>	<b>PHONE: 518-587-0781 x572</b>
<b>PAYMENT ADDRESS</b>		<b>INVOICE ADDRESS</b>	
Fiber Technologies Networks, L.L.C. 300 Meridian Centre Rochester, New York 14618		Lessee City of Saratoga Springs Address City Hall/Finance Dept/ 474 Broadway Address Saratoga Springs, NY, 12866	
<b>ATTN: Accounts Receivable</b>	<b>PHONE: (585) 697-5100</b>	<b>ATTN: Linda Curley</b>	<b>PHONE: 518-5873550 x567</b>

**II. DESCRIPTION OF ROUTE<sup>12</sup>**

<b>ROUTE DESCRIPTION:</b> See Schedule 1 below.	
<b>DELIVERY DATE:</b> 120-180 days from Contract Acceptance	
<b>Product Order Number</b> 001	<b>Product Order Term</b> ( 5 ) Years from Route Acceptance Date
<b>Attached Schedules:</b> Schedule 1 – Dark Fiber Route Map and Route Description Schedule 2 – Route Pricing Schedule 3 – Route Specifications	

**III. GRANT**

Upon the Acceptance Date of this Product Order and subject to the terms and conditions of the Master Facilities Agreement referenced below, Lessor hereby leases specific Fibers in the Cable over the Route as set forth in Schedule 1 ("Dark Fiber Route Map and Route Description") attached hereto.

This Product Order is entered into between Fiber Technologies Networks, L.L.C. and Lessee as of \_\_\_\_\_, 2008 (the "Effective Date") and incorporates the terms and provisions as set forth in the Master Facilities Agreement entered by and between Lessee and Fiber Technologies Networks, L.L.C. Capitalized terms used but not defined herein shall have the meaning set forth in the Agreement.

**FIBER TECHNOLOGIES NETWORKS, L.L.C.**

By: Michael C. Hurley  
 Name: Michael C. Hurley  
 Title: Vice President  
 Date: August 19, 2008

**LESSEE**

By: CITY OF SARATOGA SPRINGS  
 Name: [Signature]  
 Title: MAYOR  
 Date: August 21, 2008

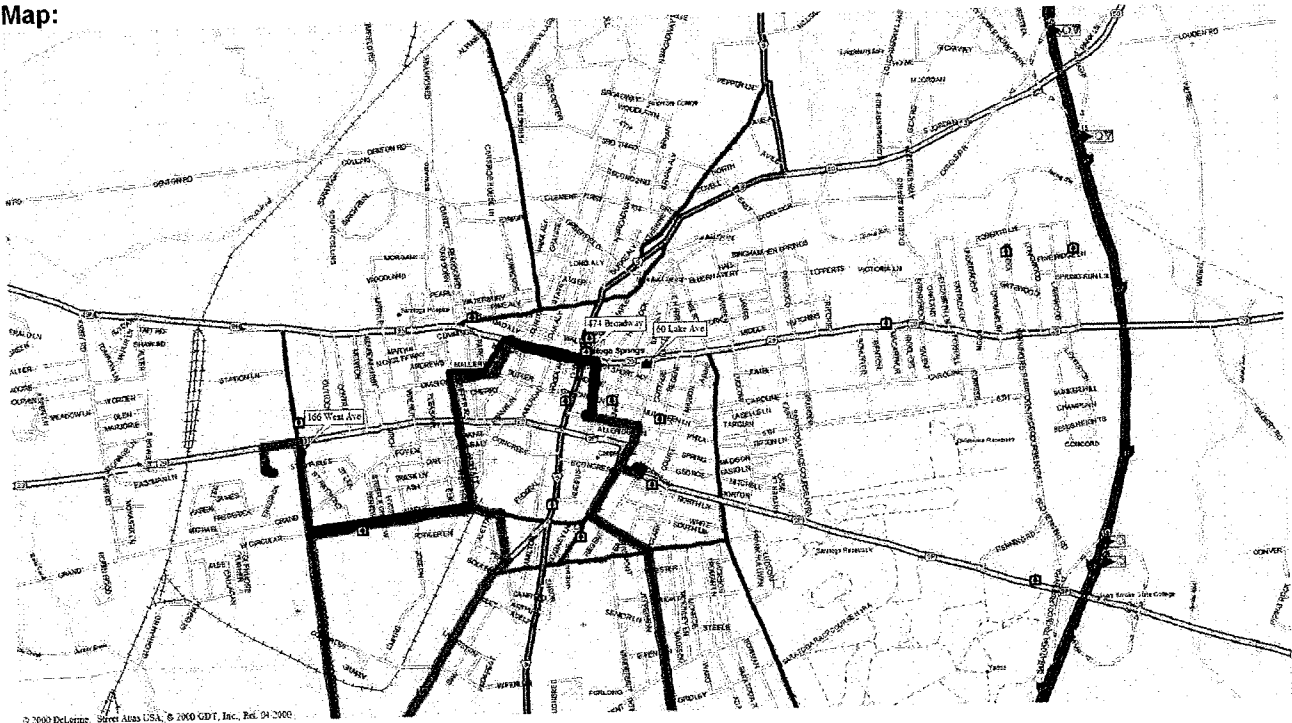
<sup>1</sup> In the event that multiple point-to-points are ordered under a single Product Order, each point-to-point with the same A-side and Z-side address will be considered a single Product Order and will follow the acceptance process independent from the point-to-point Product Orders.

<sup>2</sup> Customer is responsible for easement into building, any building entry fees and/or permissions that the landlord may require.

**Schedule 1**

**Dark Fiber Route Map and Route Description**

**Map:**



**Route Description:** Lessor shall perform, or cause to be performed, such work, if any, at its expense, as may be required for placement of the Cable on or in the Routes as set forth in this Schedule 1.

Route 1: Two (2) strands dark fiber in a point to point configuration to run from 474 Broadway, Saratoga Springs to 166 West Ave, Saratoga Springs. Demarks will be at the current demark at 474 Broadway and at locations TBD at 166 West Ave. Route 1 provided under franchise agreement costs for building entrance only

Route 2: Two (2) strands of dark fiber from 474 Broadway, Saratoga Springs to 60 Lake Ave, Saratoga Springs. Demarks will be at the current demark at 474 Broadway and at locations TBD within 60 Lake Ave There is additional language in hard copy that is not reflected in this version.



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## Schedule 2

### Recurring Charges

Each Route identified in Schedule #1 is subject to a monthly Use Charge, such Use Charge shall be equal to the following:

Route #1	\$ 250.00_per month	5 years after date of acceptance
Route #2	\$ 950.00 per month	5 years after date of acceptance

Total Monthly \$ 1200.00 per month

Lessor shall begin invoicing Lessee for such Use Charge for each Route Segment from the date notice was provided of the delivery of the Lessee Fibers within such Route. Lessor shall thereafter invoice lessee for all Use Charges on the first (1<sup>st</sup>) day of the next month and each successive month thereafter.

### Upfront Use Charges

Each Route identified in Schedule #1 is subject to an upfront Use Charge, such Use Charge shall be equal to \$0.00 Lessee shall pay fifty percent (50%) of the Upfront Use Charge for each Route within fifteen (15) days of execution of this Agreement or any amendment hereto. The balance of the Upfront Use Charge and other applicable fees specified in this Schedule will be invoiced upon Customer Acceptance.

### Other Fees

Splice Fee (per splice): Included  
Maintenance Fee: Included  
Building Entry Fee: Included  
Fiber Distribution Panel: Included





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### Schedule 3

#### Route Specifications

##### A. Cable Parameters

**Fiber type:** Single Mode (SMF-28) - Matched Clad

**Glass Type:** 8/125 microns

**Buffer:** Loose Buffer Tube Single Fibers or Loose Buffer Tube Ribbon Fibers Gel Filled and/or Dry Block

**Operating Wavelength:** 1310/1550nm

**Maximum Attenuation:** 0.35 dB/km for 1310 wavelength  
0.25 dB/km for 1550 wavelength

##### B. Lessee Contact(s)

###### Primary

###### Alternate

**Name:** Kevin Kling

**Stephani Voigt**

**Title:** Insert

**Insert**

**Office:** 518-5877098 x572

518-5873550 x550

**Pager:**

**E-mail:** [Kevin.kling@saratoga-springs.org](mailto:Kevin.kling@saratoga-springs.org)

[stephani.voigt@saratoga-springs.org](mailto:stephani.voigt@saratoga-springs.org)

##### C. Schedule of Delivery **120-180 days**