

If this information is required in an accessible format, please contact 1-800-372-1102 ext. 2303



The Regional Municipality of Durham Report

To: Finance and Administration Committee
From: Commissioner of Finance and Regional Solicitor
Report: #2023-F-03
Date: January 17, 2023

Subject:

Regional Broadband Network: entering into indefeasible Right of Use Agreement for Durham OneNet Inc.'s use of Regional assets.

Recommendation:

It is recommended to Regional Council that:

- A) Regional staff be directed to enter into an Indefeasible Right of Use Agreement with Durham OneNet Inc. (DONi) for the use of Regional assets on substantially the same terms as provided in the attached draft.
 - B) The Commissioner of Finance is authorized to execute an Indefeasible Right of Use Agreement on behalf of the Region of Durham, subject to the approval of the final terms and conditions by the Regional Solicitor.
-

Report:

1. Purpose

1.1 The purpose of this report is to:

- a. Seek Council approval to enter into an Indefeasible Right of Use Agreement (IRU) with Durham OneNet Inc. (DONi) for the use of Regional assets on substantially the same terms as provided in the attached draft.
- b. Seek Council authorization for the Commissioner of Finance to execute the IRU agreement on behalf of the Region of Durham, subject to the approval of the final terms and conditions by the Regional Solicitor.

2. Background

- 2.1 The Region incorporated a municipal services corporation, Durham OneNet Inc. (DONi) under the authority of the *Municipal Act, 2001*. DONi is a separate legal entity from its owner, the Region (which is the sole shareholder).
- 2.2 The purpose of DONi is to develop, build and operate a fibre optic network to implement the Broadband Strategy approved by Council in 2019, with the goal that “Durham’s residents, businesses and institutions will have access to fast, reliable, and affordable broadband services so that they may fully participate, compete and thrive in the 21st century”.
- 2.3 DONi is constructing Regional broadband assets and an appropriate ownership structure will be required for the Region to transfer rights in these assets to DONi.
- 2.4 Regional staff have actively pursued federal and provincial grant opportunities to fund the development and construction of the broadband network assets under the Province’s Improving Connectivity for Ontario (ICON) program, administered by the Ministry of Infrastructure, and the federal Universal Broadband Fund (UBF) program administered by Innovation, Science and Economic Development Canada (ISED).
- 2.5 With respect to the transfer of Regional assets, the applicable Regulation under Section 203 of the *Municipal Act, 2001* requires the Region to adopt and maintain policies on asset transfers to corporations, such as DONi, in advance of transferring any assets to a corporation. The Asset Transfer Policy approved by Council on December 22, 2021, and the DONi Board on June 28, 2022 (page 73 to 74 of 2021-COW-23) amongst other items “permits the transfer of Regional assets to corporations owned by the Region in accordance with the requirements of applicable legislation.” The Policy indicates that “any transfer of Assets must be approved by Council in advance of the transfer, based on consultation with the Regional Solicitor and the Commissioner of Finance/Treasurer, to ensure compliance with prevailing legislation, including but not limited to the [Municipal] Act, and municipal reporting requirements.”
- 2.6 The Asset Transfer Policy approved by Council does not specifically transfer any Regional assets and Report 2021-COW-23 indicates that no assets are being transferred at this time. Either a full transfer of assets from the Region to DONi or the Region providing DONi with an IRU is consistent with the Asset Transfer Policy. As an IRU is a form of transfer, Council approval is required for authority to enter into an IRU with DONi.
- 2.7 Previous Report #2021-COW-32 (approved by Regional Council on December 22, 2021) included a shareholder direction from the Region (as sole shareholder) to DONi. Included in the Shareholder’s Direction (section 5.4(a)) was the asset ownership interests for DONi, which states:
 - a. The Corporation will own **or have such ownership interests** in the assets and infrastructure of the Network as acquired by it in conformance with the

Annual Business Plan and as transferred to it by the Region pursuant to transfers entered into by the Region in conformance with any applicable Asset Transfer Policy, with the exception of assets and infrastructure that may be owned by any third-party entity also involved in developing and operating the Network [emphasis added].

- 2.8 The Shareholder's Direction provides additional controls on DONi in Sections 8.4 (e), 8.5 (b) and 8.5 (g) which would provide a check and balance on DONi's dealing with any assets in addition to the terms and conditions in an IRU. Specifically, DONi requires prior written approval of the Region to:
- a. "Sell or otherwise dispose of, by conveyance, transfer, lease, sale or leaseback, or other transaction, or grant security, charges or mortgages upon the assets of [DONi] in respect of all, substantially all or a material amount or value of its assets or undertaking or in any transaction or series of transactions at variance with or not provided for in [DONi's] Annual Business Plan" (Section 8.4 (e)).
 - b. "Sell, transfer or otherwise dispose or encumber all, substantially all or a material amount or value of [DONi's] assets or undertaking or undertake any transaction or series of transactions which are at variance with or are not provided for in [DONi's] Annual Business Plan" (Section 8.5 (b)).
 - c. "Enter into any loan agreement, guarantee or grant any security or convey any assets that are not provided for in or do not conform to [DONi's] Annual Business Plan" (Section 8.5 (g))
- 2.9 In addition, the Municipal Capital Facility By-law (approved by Council on December 22, 2021) and the Municipal Capital Facility Agreement (approved by Council on December 22, 2021) (pages 70 to 71 of 2021-COW-32) indicates that:
- a. "The Region and [DONi] agree and acknowledge that the Region intends to transfer ownership of whole or part of the Facilities to [DONi] by way of gift or sale, including a sale for nominal less than fair market consideration or no consideration, or to otherwise lease, licence or lend the use of the whole or part of the Facilities to [DONi]."
 - b. "The Region covenants and agrees that it will consent to [DONi's] use of and access to the Regional Rights-of-Way as may be required in order to construct, operate, maintain and expand the Facilities. The Region and [DONi] covenant and agree that they will execute such further agreements as are necessary for this purpose."
 - c. "Except for the specific assistance set forth herein, the Region is not obligated in any manner with respect to the Facilities or to provide any additional financial assistance in connection therewith."
- 2.10 An Indefeasible Right of Use Agreement (IRU) is consistent with the Municipal Capital Facility By-law and Municipal Capital Facility Agreement.

- 2.11 The options for governance and ownership of broadband assets have been discussed and considered by staff at the Durham Region Broadband Steering Committee. For reasons set out below, staff are recommending that the Region retain ownership of broadband assets and that DONi be given an interest in the assets through an IRU.
- 2.12 An IRU allows the Region to retain ownership of critical broadband assets that have been funded by and are projected over the medium term (five years) to be funded by public funds. Additionally, this approach ensures the Region retains ownership of assets that support the delivery of critical regional services including traffic signals and the internet connectivity of Regional facilities. This provides additional security, control and flexibility to the Region should a decision be made in the future to enter into public private partnerships or pursue divestment, sale or other exit strategies. This decision does not preclude the transfer of existing or new assets to DONi in the future should the Region's objectives change or there be an identified benefit to the Region in transferring ownership.
- 2.13 Other regional governments in Ontario (such as York Region) have utilized the approach of the regional government maintaining ownership of broadband assets while transferring a long-term interest to the corporate entity utilizing the broadband assets through an IRU. The IRU for which Regional Council approval is requested on substantially the same terms as provided in the attached draft, is largely based on the York Region IRU with YorkNet.
- 2.14 The following are the key highlights from the draft IRU:
- a. Durham Region irrevocably transfers an equitable interest (right to use in its entirety but not own) in the network to DONi, does not retain any equitable interest thereto.
 - b. The grant of an IRU interest to DONi does not convey any legal title to, or possessory interest in, any real or personal property, including the IRU Fibre, the Cables, the Support Structures, the Routes along which the IRU Fibre is situated or the network.
 - c. DONi accepts the IRU interest on an "as is" basis. There is no financial compensation or monetary payment from DONi to the Region for the grant of an IRU interest.
 - d. DONi has substantially all benefits and risks associated with ownership of the network, subject to the terms and provisions of the IRU.
 - e. Durham Region and DONi shall not permit, cause or allow any of the IRU Fibre to form all or any part of any security granted by it nor shall either party encumber the IRU Fibre.
 - f. DONi has the right to use the IRU Fibre for any lawful purpose, which use shall include, but not be limited to, entering into contracts with third parties to provide for a right to use or lease the IRU Fibre.
 - g. DONi shall be responsible for maintenance and repair of the network IRU Fibre and the cable containing the IRU Fibre at its own expense and in accordance with specific standards and procedures detailed in the agreement.

- h. DONi shall, at DONi's sole risk and expense, perform locates and perform line clearing services to the specific standards and procedures detailed in the agreement.
- i. The Region shall, at its sole cost and expense, obtain and maintain all Rights of-Way.
- j. Upon termination or expiration of the IRU, DONi shall, at its sole expense and risk, disconnect or cause to be disconnected all third-party equipment from the network within six months after the date of termination or expiration unless the Region so chooses to enter/extend agreements with third-parties.

3. Previous Reports and Decisions

- 3.1 [#2019-P-3](#) - Connecting Our Communities; A Broadband Strategy for the Region of Durham
- 3.2 [#2020-INFO-5](#) - Durham Region Broadband Program Update
- 3.3 [#2020-EDT-6](#) - Regional Broadband Network Business Case Development and Endorsement of Grant Funding Application
- 3.4 [#2020-INFO-91](#) - Durham Region Broadband Program Update – Improving Connectivity for Ontario (ICON) Program, Stage 1 Application Status
- 3.5 [#2020-COW-29](#) - Durham Broadband Stage Two Funding Application for the Provincial Improving Connectivity for Ontario (ICON) Program
- 3.6 [#2020-EDT-11](#) - Pickering-Uxbridge Broadband Fibre Trunk Project
- 3.7 [#2021-COW-2](#) - Regional Broadband Network, Applications for Provincial and Federal Funding
- 3.8 [#2021-COW-18](#) - Update on Regional Broadband Program; Authority to Accept Improving Connectivity for Ontario (ICON) or Universal Broadband Fund (UBF) Grant Awards; and Authority to Make Project Commitments During Summer Recess
- 3.9 [#2021-COW-23](#) - CONFIDENTIAL Regional Broadband Program: Grant Application Status Update
- 3.10 [#2021-COW-32](#) - Establishing a Municipal Services Corporation to build and operate the Regional Broadband Network

4. Risk and Mitigation

- 4.1 The primary risk to the Region is to lose ownership of assets paid for with tax dollars.
 - a. The best way to mitigate this risk is to not fully transfer any assets to DONi. This ensures the Region has control and can protect and preserve its long-term access to these critical infrastructure assets. An IRU allows the Region

to retain some level of ownership/control down to a certain level to determine maintenance standards, redundancies, failsafe's etc.

- b. An IRU provides DONi with the irrevocable right to access and exclusively use the network and related equipment over the term of the IRU. Depending on wording of the IRU, DONi would be provided the flexibility and agility to pursue business ventures that are aligned with the Regional Council approved annual business plan.

5. Financial Implications

- 5.1 The Municipal Capital Facility By-law (approved by Council on December 22, 2021) and the Municipal Capital Facility Agreement (approved by Council on December 22, 2021) (pages 70 to 71 of 2021-COW-32) indicates that:

- a. "Except for the specific assistance set forth herein, the Region is not obligated in any manner with respect to the Facilities or to provide any additional financial assistance in connection therewith."

- 5.2 The Asset Transfer Policy approved by Council on December 22, 2021, and the DONi Board on June 28, 2022 (pages 73 to 74 of 2021-COW-23) amongst other items "permits the transfer of Regional assets to corporations owned by the Region in accordance with the requirements of applicable legislation." The Policy indicates that "any transfer of Assets must be approved by Council in advance of the transfer, based on consultation with the Regional Solicitor and the Commissioner of Finance/Treasurer, to ensure compliance with prevailing legislation, including but not limited to the Act, and municipal reporting requirements."

- 5.3 This approach (utilizing an IRU) allows the Region to retain ownership of critical broadband assets that have been funded by and are projected over the medium term (five years) to be funded, in full or in part, by public funds. Additionally, this approach ensures the Region retains ownership of assets that support the delivery of critical regional services including traffic signals and the internet connectivity of Regional facilities. This provides additional security, control and flexibility to the Region should a decision be made in the future to enter into public private partnerships or pursue divestment, sale or other exit strategies.

- 5.4 This decision does not preclude the transfer of existing or new assets to DONi in the future should the Region's objectives change or there be an identified benefit to the Region in transferring ownership. In accordance with the Transfer of Asset Policy, Regional Council approval for any transfer would be required.

- 5.5 As the Region is the sole shareholder of DONi, the transfer of the long-term interest in the Regional assets from the Region to DONi through the IRU remains essentially an internal matter, regardless of the fact that the DONi is a separate corporate entity from the Region. On consolidation of the financial statements of DONi with the Region, the value of the IRU, an asset to DONi, is eliminated for reporting. Only the value of the capital assets remains for reporting.

6. Conclusion

- 6.1 It is recommended that the Region enter into an IRU with DONi to allow DONi a long-term interest in Regional broadband assets on substantially the same terms as provided in the attached draft.
- 6.2 It is recommended that the Commissioner of Finance be authorized to enter into an IRU with DONi, subject to the approval of the final terms and conditions by the Regional Solicitor.

7. Attachments

Attachment #1: Draft IRU

Respectfully submitted,

Original Signed By

Nancy Taylor
Commissioner of Finance/Treasurer

Original Signed By

Jason Hunt
Regional Solicitor

Recommended for Presentation to Committee

Original Signed By

Elaine C. Baxter-Trahair
Chief Administrative Officer

THIS INDEFEASIBLE RIGHT OF USE AGREEMENT made as of **XXXXXXXX, XX,**
2023 (the “**Effective Date**”)

BETWEEN:

THE REGIONAL MUNICIPALITY OF DURHAM,
a corporation constituted under the laws
of the Province of Ontario
(the “**Region**”)

-and-

DURHAM ONENET INC.,
a corporation incorporated under the laws
of the Province of Ontario
(“**OneNet**”)

RECITALS:

- A. The Region intends to build broadband internet infrastructure (the “**Network**”) to remote and underserved areas of Durham Region in cooperation with private third parties and with the financial assistance of grant funds from senior levels of government.
- B. The Region incorporated OneNet under the *Business Corporations Act (Ontario)* on February 10, 2022 as a municipal services corporation pursuant to the *Municipal Act, 2001* and the Regulations thereunder. The Region owns all of the issued and outstanding shares of OneNet.
- C. Pursuant to the Region’s shareholder direction to OneNet dated February 10, 2022 (the “**Shareholder Direction**”) OneNet is responsible for the strategic planning, management and development of the Network.
- D. The Region will continue to own the Network, as currently constructed, and will own any and all future segments of the Network that are acquired and/or constructed during the period in which this Agreement is in effect.
- E. To enable OneNet to carry out OneNet’s responsibilities under the Shareholder Direction, the Region wishes to grant to OneNet an indefeasible right of use to the Network for a period of thirty (30) years.
- F. With the granting by the Region to OneNet of such indefeasible right of use, the Region desires to irrevocably transfer an equitable interest in the Network to OneNet, subject to the terms and provisions of this Agreement.
- G. The parties intend that OneNet shall have substantially all benefits and risks associated with ownership of the Network, subject to the terms and provisions of this Agreement.

NOW THEREFORE in consideration of the mutual covenants and agreements, and other good and valuable consideration, the receipt and sufficiency of which is hereby irrevocably acknowledged, and subject to the terms and conditions contained herein, the parties agree as follows:

Article 1 **Definition and Interpretation**

1.1 Defined Terms

1.1.1 In this agreement, including the Recitals and the Schedules hereto, in addition to terms defined elsewhere in this Agreement, unless the subject matter or context otherwise requires, the following terms shall have the respective meanings set out below and grammatical variations of such terms shall have corresponding meanings:

“**Affiliate**” has the meaning to it in the *Business Corporations Act* (Ontario), as amended.

“**Agreement**” means this Indefeasible Right of Use Agreement between the Region and OneNet and any Schedules attached to this Agreement, as same may be amended from time to time.

“**Applicable Laws**” means any federal, provincial or municipal statute, regulation, or by-law applicable to the subject matter detailed under this Agreement as the same may be amended, or replaced by successor legislation, from time to time. In this Agreement, a reference to a statute shall include any amending or successor legislation, and the regulations made under that statute.

“**Authority**” means any federal, provincial, regional or municipal government, board, agency or other authority, having or claiming jurisdiction over the matter.

“**Business Day**” means a day other than a Saturday, a Sunday, or a statutory holiday in the Province of Ontario.

“**Cable**” means a fibre cable and the Strands contained therein. In this Agreement, the Cable may include splicing connection, conduit or a Service Drop.

“**Connecting Point**” means a physical location where the IRU Fibre are technically/mechanically joined to another telecommunications network’s Fibre, typically the start and end points of an IRU Fibre section. Connecting Points may include:

- i. Existing in-building patch or splice panel where the IRU Fibre terminates in a building.

- ii. Any existing aerial or underground splice point along a Cable containing the IRU Fibre.
- iii. Any additional point along a Cable containing the IRU Fibre where a mutually agreed upon strategy can be devised to access the IRU Fibre.

“Customer” means any Person that enters into a contract with OneNet to use all or a portion of the IRU Fibre.

“Dark Fibre” means single-mode Strands of optical fibre in the Network which are capable of bi-directional wave-division multiplexing of transported signals, through which no light, light communications or signals are transmitted.

“Dark Fibre Specifications” means the specifications for Dark Fibre in the Network set out in Schedule C.

“Effective Date” means the date upon which this Agreement comes into effect as set out in the introductory clause of this Agreement.

“Fibre” means optical fibre cable.

“Force Majeure” means any event beyond reasonable control of a party including but not limited to and without restricting the generality thereof, (i) fires, lightning, storms, earthquakes, landslides, floods, washouts, and other acts of God; (ii) explosions, ruptures, breakage of or accidents to pipeline, plant, machinery, equipment of storage facilities; (iii) strikes, lockouts, or other labour disturbances; (iv) national emergencies, civil disturbances, sabotage, war, blockades, insurrections, vandalism, riots, epidemic; (v) government, legal or statutory restrictions on forms of commercial activity; (vi) arrests and/or restrains by government or government agencies; (vii) the order of any court; (viii) the order of any civil or military authority; (ix) inability to obtain or curtailment of supplies of electric power, water, fuel or other necessary utilities or services to operate any facilities or of any materials or equipment; and/or (x) inability to obtain or revocation or amendment of any permit(s), authorization(s) or approval(s) of any Authority required to perform or comply with any obligation under this Agreement, unless the revocation or modification of any such necessary permit(s), authorization(s) or approval(s) was caused by the violation of the terms thereof or consented to by the party holding same.

“FOSC” means fibre optical splice closure.

“Insolvency Event” means (i) a proceeding in respect of either party under the *Bankruptcy and Insolvency Act (Canada)*, the *Companies’ Creditors Arrangement Act (Canada)*, the *Winding-up and Restructuring Act (Canada)* or any other bankruptcy, insolvency or other similar rules or laws for the benefit of or dealing with the rights of debtors and creditors, (ii) the appointment of an interim receiver, receiver, receiver and manager or liquidator over a substantial portion of the

assets of either party, or (iii) any enforcement of or realization upon any security over the Network or portion thereof or over a substantial portion of any of the other assets of a party.

“IRU” or “Indefeasible Right of Use” means an irrevocable right to access and exclusively use during the term of an IRU Grant specified strands of fibre optic cable. An IRU confers on the grantee substantially all of the risks and rewards of ownership.

“IRU Fibre” means the specific Strands of Dark Fibre, as same is set out in quality (in Strands) and kilometers (in Route Kilometers) of Fibre within the Network, which the Region hereby grants to OneNet and OneNet hereby acquires from the Region, on an IRU basis, pursuant to the terms and conditions of this Agreement.

“IRU Grant” means a grant of an Indefeasible Right of Use by the Region to OneNet in IRU Fibre pursuant to and in accordance with this Agreement.

“OTDR” means Optical Time Domain Reflectometer.

“Over Lash” means to place an additional Cable or Strand onto an existing Cable or Strand.

“party” means, unless the context otherwise requires or provides, either of the Region or OneNet.

“Person” means any individual, corporation, municipal corporation, firm, partnership, limited liability company, association, joint venture or organization of any kind and the lawful trustee, successor, assignee, transferee or personal representative thereof.

“Reasonable Efforts” shall mean efforts commercially and reasonably designed to achieve the desired results but shall not oblige the party making the efforts to make unreimbursed expenditures that are substantial in amount, in light of the circumstances to which the requirement to use reasonable efforts applies.

“Recital” means a recital in this Agreement set out on the first and second pages of this Agreement.

“Region” means The Regional Municipality of Durham as a municipal corporation, or if the context requires, its geographic area.

“Right-of-Way” means an easement, licence, right-of-way, or other similar right of use or occupy land including any highway, street, walkway, road allowance, lane, bridge, viaduct and boulevard.

“Route(s)” means, generally, a route on a telecommunications network along which a party has been granted an IRU, and in respect of the Network, is a route

depicted on the Network Map attached hereto as Schedule A, as such Map may be updated from time to time.

“Route Kilometers” means the actual kilometers traversed by the Cable (including spurs) along a Route, as measured by OTDR.

“Schedule” means any Schedule to this Agreement as listed in Section 1.4.1.

“Service Drop” means a Cable affixed to the Network at a Connecting Point leading to a Customer’s equipment or facilities.

“Strands” means standard strands of Dark Fibre.

“Strand Kilometers” means the number of Strands in a Cable multiplied by the Route Kilometers.

“Support Structures” means the infrastructure necessary to support the operations of the IRU Fibre including without limitation, conduit, troughing, pedestals, slack containers, poles, handholds, warning signals, manholes, marking posts and any equipment related thereto, but excluding Fibre, any electronic, optronic, optical or similar equipment.

“Taxes” means all municipal, sales, use, value added, goods and services, harmonized and other taxes (other than tax imposed on the income, capital, property or payroll of a Person) and similar charges required to be reported upon or paid to any domestic or foreign jurisdiction and all interest and penalties thereon (but excluding interest and penalties imposed on a party as a result of its failure to fulfill all of its obligations to applicable tax authorities), whether initially or as a result of reassessment.

“Term” means the Term of this Agreement as set out in Section 2.1.1.

“Underlying Rights” means all of the rights, licences, permits, authorizations, easements, leases, fee interests, and other agreements or authorizations from governmental or private third parties that underlie the Network and provide access to Support Structures in connection with the Network and that are necessary for the installation, operation, maintenance, removal and use of the Network and IRU Fibre.

“The Network Map” means the Network Map attached as Schedule A to this Agreement, as such Map may be updated from time to time.

“The Network operations policies” means OneNet’s change control and other operations policies generally applicable to the Network, as may be updated and/or amended from time to time, by OneNet, in its sole discretion.

1.2 Recitals

1.2.1 The recitals form a part of this agreement.

1.3 Sections and headings

1.3.1 The division of this Agreement into Sections and the insertion of headings are for convenience of reference only and shall not affect the interpretation of this Agreement.

1.3.2 Unless otherwise indicated, any reference in this Agreement to a Section, subsection or clause, or to a Schedule, refers to the specified Section, subsection or clause of, or a Schedule to this Agreement.

1.4 Schedules

1.4.1 The following Schedules are attached to and form part of this Agreement:

Schedule A: The Network Map

Schedule B: **INTENTIONALLY DELETED**

Schedule C: Dark Fibre Specifications and Fibre Acceptance Testing

Schedule D: Maintenance and Operations Procedures

Article 2 TERM OF AGREEMENT

2.1 Term

2.1.1 Subject to termination rights in this Agreement and except as otherwise specified, this Agreement shall be of full force and effect for a period of thirty (30) years commencing on the Effective Date (the “Term”), unless the parties agree in writing to extend it.

Article 3 GRANT OF IRU FIBRE

3.1 IRU Grant

3.1.1 To the extent that the Region is permitted by the Underlying Rights and, subject to the terms and conditions of this Agreement, the Region hereby grants to OneNet an IRU interest in all of the Dark Fibre in the Network existing at the Effective Date and any further Dark Fibre in the Network that may be acquired and/or constructed during the Term, with the exception of the Dark Fibre in the Network in which the Region’s private third party partner, Vianet Inc., has an interest.

- 3.1.2 The Region represents and agrees that, for all purposes, with the grant of an IRU interest to the Network's Dark Fibre under and pursuant to this agreement, the Region (i) irrevocably transfers an equitable interest in the IRU Fibre to OneNet for the term of the grant of such IRU Fibre, (ii) does not retain any equitable interest thereto, and (iii) once the transfer of the IRU Fibre to OneNet comes into effect, has no right to use such IRU Fibre for the term of the grant of such IRU Fibre, with the exception of the capacity in the IRU Fibre required for the Region to operate traffic lights, other Regional infrastructure and to connect to Regional facilities.
- 3.1.3 OneNet shall have no right, title or interest in the IRU Fibre or any part thereof other than, conditional upon OneNet's compliance with the fulfillment of the terms and conditions of this Agreement, the right to use and enjoy the IRU Fibre to which it has acquired an IRU interest during the Term of this Agreement in accordance with the terms and conditions herein. The grant of an IRU interest to OneNet under this Agreement does not convey any legal title to, or possessory interest in, any real or personal property, including the IRU Fibre, the Cables, the Support Structures, the Routes along which the IRU Fibre is situated or the Network, unless otherwise specifically provided herein. The IRU Grant to OneNet herein does not include any equipment used to transmit capacity over or "light" the IRU Fibre.
- 3.1.4 Subject to the Region's representation and warranty under Section 6.1.1(e) that the Dark Fibre meets the Dark Fibre Specifications set out in Schedule C, OneNet accepts the grant under this Agreement of an IRU interest to IRU Fibre on an "as is" basis without warranties of any kind, either express or implied. OneNet hereby disclaims all other warranties or representations, both express or implied, including but not limited to the warranties of merchantability and fitness for a particular purpose.
- 3.1.5 In respect of Dark Fibre in the Network that is owned by the Region as at the Effective Date, the Region shall be deemed to have granted to OneNet, and OneNet shall be deemed to have accepted from the Region, an IRU interest in such Dark Fibre, as at the Effective Date. In respect of Dark Fibre in the Network that is acquired and/or constructed during the Term, the Region shall be deemed to have granted to OneNet, and OneNet shall be deemed to have accepted from the Region an IRU interest in such Dark Fibre as of the date same is acquired and/or constructed.

3.2 Consideration for the Grant

- 3.2.1 There will be no financial compensation or monetary payment from OneNet to the Region for the grant of an IRU interest in the Dark Fibre to OneNet pursuant to this Agreement.

3.3 Grant not an Executory Contract

3.3.1 The parties agree that:

- a) the IRU Grant hereunder and pursuant to this Agreement shall be treated as, and deemed to be, an executed grant by the Region to OneNet;
- b) from and after the Effective Date to this Agreement and, except as otherwise expressly provided in this Agreement, no material obligations of either party shall remain to be performed with respect to the IRU Grant hereunder and pursuant to this Agreement, and
- c) this Agreement does not constitute an executory contract with respect to the IRU Grant hereunder and pursuant to this Agreement, notwithstanding that there are other executory obligations of both parties under this Agreement, including the provision of maintenance services.

3.4 Applicable Laws

- 3.4.1 Notwithstanding anything in this Agreement to the contrary, OneNet shall act in accordance with and comply with all Applicable laws, guidelines and/or codes of every Authority in exercising, enjoying and otherwise dealing with an in anyway relating to its IRU interest in the IRU Fibre or any Strand thereof. OneNet shall, at its own expense, obtain and maintain any required licenses, permits and approvals applicable to OneNet's acquisition of any IRU interest in the IRU Fibre.
- 3.4.2 Notwithstanding anything in this Agreement to the contrary, the Region shall act in accordance with and comply with all Applicable Laws, guidelines and/or codes of every Authority in granting any IRU interest in the IRU Fibre or any Strand thereof to OneNet. The Region shall, at its own expense, obtain and maintain any required licences, permits and approvals applicable to any such grant to OneNet hereunder.

3.5 No Encumbrances

- 3.5.1 The parties shall not permit, cause or allow any of the IRU Fibre to form all or any part of any security granted by it nor shall either party encumber the IRU Fibre under any mortgage, charge, lien, pledge, security interest or encumbrance of any kind or nature and each of the parties shall ensure that the IRU Fibre shall not be liable to seizure for arrears of rent or taxes, or under execution, bankruptcy proceedings or other legal process against such party, except that a party may grant a security interest to secure its financial obligations, subject to OneNet's rights in respect of the IRU Fibre as provided for in this Agreement. In the even that any part of the IRU Fibre is encumbered contrary to the foregoing, the responsible party shall immediately take any and all necessary steps at its own risk and expense to remove the said encumbrance(s). If any such encumbrance is not discharged and released within sixty (60) days after the

effective date of such encumbrance (or within such shorter period as shall be mandated under the applicable law), the other party may pay or secure the release thereof at the expense of the responsible party.

Article 4 USE OF IRU FIBRE

- 4.1 Subject to the terms and conditions herein, OneNet shall have the right to use the IRU Fibre for any lawful purpose, which use shall include, but not be limited to, entering into contracts with third parties to provide for a right to use or lease the IRU Fibre or the provision of telecommunications services via the IRU Fibre.
- 4.2 Subject to any restrictions imposed by, or rights of, an Authority, any applicable Network operations policies, including without limitation, network safety procedures, and the securing and maintain of applicable Rights-of-Way, there shall be no limitations on the types of electronics or technologies that may be employed to utilize the IRU Fibre, so long as such electronics or technologies do not interfere with the use of or present a risk of damage to any portion of the Network, any Support Structures, and/or any third party equipment attached to the Network.
- 4.3 The Region covenants and agrees that OneNet shall and may peaceably and quietly enjoy and use the IRU Fibre or any part thereof without molestation, hindrance, disturbance or interruption from or by the Region or any Person claiming through or under the Region.
- 4.4 OneNet hereby accepts the requirements, restrictions and/or limitations on OneNet's right to use the IRU Fibre imposed under the Underlying Rights.

Article 5 NETWORK MAINTENANCE OBLIGATIONS

5.1 Network Maintenance Obligations

- 5.1.1 OneNet shall be responsible for maintenance and repair of the Network. OneNet shall maintain, or shall cause to be maintained, the Network, in good working order, condition and repair. OneNet shall perform such maintenance and repair obligations in accordance with the maintenance and operation procedures set forth in Schedule D and in a professional, diligent and timely manner, using competent personnel who have the necessary technical skills, qualifications, experience, certifications and training. OneNet shall report to the Region on an annual basis (beginning one year after the Effective Date) on the physical state of the IRU Fibre to the best of its knowledge.
- 5.1.2 OneNet shall have, at various key locations along the Route(s) containing the IRU Fibre, which locations shall be determined by OneNet in its sole discretion, all tools, lengths of Fibre, and transportation equipment and construction

materials that OneNet deems necessary to enable it to react to and deal appropriately with various situations or emergencies along the Route of the IRU Fibre and to promptly respond to such situations or emergencies in accordance with industry standards and practices.

- 5.1.3 OneNet shall operate the Network in such manner so as to ensure that there is no material interference with a third party customer's use or enjoyment of the IRU Fibre and so as not to cause any material damage, disturbance or interference to the Region's or to any third party's equipment.
- 5.1.4 OneNet shall, at OneNet's sole risk and expense, perform the following activities: (i) locate and mark the location of the Cable(s) containing the IRU Fibre when OneNet has notice that third parties are digging or constructing near the Cable(s), upon notice to OneNet of such activities and OneNet shall act upon such locate requests in conformance with the provisions of the *Ontario Underground Infrastructure Notification System Act, 2012, S.O. 2012, c. 4* ; and (ii) perform line clearing services which shall involve the provision of adequate clearance from tree interference for the IRU Fibre and includes, underbrushing, tree removal and disposal of debris.
- 5.1.5 The Region shall, at its sole cost and expense, obtain and maintain all Rights-of-Way, permits and other permissions in respect of the Support Structures to give effect to an IRU Grant to OneNet pursuant to this Agreement.

5.2 IRU Fibre Maintenance Obligations

- 5.2.1 OneNet shall be responsible for maintenance and repair of the IRU Fibre and the Cable containing the IRU Fibre. OneNet shall, at its sole expense, maintain the IRU Fibre in good working order, condition and repair and in such manner so as to ensure that there is no material interference with a third party's use or enjoyment of the IRU Fibre and so as not to cause any material damage, disturbance or interference to the Region's or any third party's equipment. OneNet shall take remedial measures at its sole expense that it considers necessary to mitigate the potential of any such damage, disturbance or interference occurring.

Article 6 REPRESENTATIONS AND WARRANTIES

6.1 Representations and Warranties of the Region

- 6.1.1 The Region represents and warrants to OneNet, with the intent that OneNet shall rely thereon in entering into this Agreement, the following:
- a) the Region has all the necessary power, authority and capacity to enter into this Agreement and to perform its obligations hereunder;

- b) the execution of this Agreement and compliance with and performance of the terms, conditions and covenants contemplated herein have been duly authorized by all necessary corporate action on the part of the Region;
 - c) the Region is the absolute beneficial and legal owner of the Dark Fibre and presently has good, clear and marketable title thereto, free and clear of any liens, charges, encumbrances or rights of others and is exclusively entitled to and authorized to grant IRU interests in the Dark Fibre to OneNet in accordance with the terms and conditions of this Agreement;
 - d) the Region has good and sufficient rights, including the Underlying Rights, to locate, maintain, operate, use and access the Support Structures in their existing location; and
 - e) Schedule C contains the characteristics of the Dark Fibre in respect of any IRU Grant to OneNet pursuant to this Agreement.
- 6.1.2 The Region covenants not to sell, lease, transfer or otherwise dispose of its beneficial and legal ownership in the Network and/or IRU Fibre or part thereof to a third party during the Term of this Agreement or the terms of the grant of any such IRU Fibre unless as a condition to completing such sale, lease, transfer or other disposition, the Region causes such third party to enter into an assumption agreement with OneNet to assume all of the Region's obligations under this Agreement and provided that the Region has obtained OneNet's prior written consent to the sale, lease, transfer or other disposition to such third party.

6.2 OneNet's Representations and Warranties

- 6.2.1 OneNet represents and warrants to the Region, with the intent that the Region shall rely thereon in entering into this Agreement, the following:
- a) it has all the necessary corporate power, authority and capacity to enter into this Agreement and to perform its obligations hereunder; and
 - b) the execution of this Agreement and compliance with and performance of the terms, conditions and covenants contemplated herein have been duly authorized by all necessary corporate action on the part of OneNet.

Article 7 DEFAULT, TERMINATION AND ABANDONMENT

7.1 Events of Default

The occurrence of any of the following events shall constitute an “**Event of Default**”:

- a) if either party (“**Defaulting Party**”) has failed to perform any obligation hereunder other than as a result of and to the extent of any event of Force Majeure, the

other party has given the Defaulting Party written notice of such failure and such failure has continued for a period of sixty (60) days, or if such failure is capable of being cured but cannot reasonably be cured within such sixty (60) day period, and the Defaulting Party provides reasonable written evidence that it is pursuing such cure with diligence to the satisfaction of the other party acting reasonably, such longer time period as may be necessary to complete such cure if the same is pursued with due diligence; or

- b) if an Insolvency Event in respect of either party has occurred.

7.2 Remedies upon Event of Default

Upon the occurrence of an Event of Default by a Defaulting Party:

- a) the other party may pursue any legal remedies it may have under Applicable Laws or principles of equity relating to such default, including specific performance;
- b) the other party's obligations with respect to an IRU Grant shall be suspended while such Event of Default is continuing; and
- c) the other party may terminate this Agreement.

7.3 Disconnection and Removal of Equipment

Upon termination or expiration of this Agreement or of an IRU interest in specific Strands of IRU Fibre, OneNet shall, at its sole expense and risk, disconnect or cause to be disconnected all third party equipment from the Network within the six (6) month period after the date of termination or expiration, as the case may be, and shall repair or cause to be repaired any damage to the Network or to any third party's property or equipment that was caused by such disconnection and removal. If OneNet fails to have any such equipment disconnected and removed as required under this Section 7.3, the Region may do so and invoice OneNet for all of its reasonable costs in so doing. OneNet agrees to pay any such invoice within thirty (30) Business Days after receipt thereof.

7.4 Effect of Termination

If this Agreement is terminated by OneNet prior to the end of the Term due to an Event of Default by the Region as defined in Section 7.1 such termination shall not relieve the Region of or from its obligations hereunder, and notwithstanding such termination, the rights granted to OneNet hereunder shall continue to be of full force and effect in respect of any then existing IRU Grants for such time as any contract between OneNet and a third party in respect of such IRU Grant continues in existence.

7.5 Reversion of Interest

Subject to the terms and conditions of this Agreement, upon termination or expiration of this Agreement, any IRU interest granted by the Region to OneNet in IRU Fibre shall revert to the Region, its successors and assigns.

7.6 Rights and Obligations Arising Prior to Termination

Notwithstanding anything to the contrary contained herein, no termination or expiration of this Agreement shall affect the rights or obligations of either party hereto with respect to any then existing defaults or the obligation to make any payment required hereunder prior to the termination or expiration of this Agreement.

Article 8 CONFIDENTIALITY

8.1 MFIPPA

The parties acknowledge that OneNet is deemed to be an “institution” as defined under, and for the purposes of, the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (“**MFIPPA**”). As such, OneNet is subject to and bound by obligations under MFIPPA with respect to the collection, use and disclosure of information pertaining to or in respect of this Agreement.

8.2 Confidentiality of Information

- 8.2.1 The Region agrees to identify to OneNet, in writing, as required from time to time, any information (“**Region's Confidential Information**”) provided by the Region to OneNet in respect of this Agreement pertaining to the Region and its business where the disclosure of which could prejudice significantly the Region's competitive position or economic interests or could reasonably be expected to be injurious to Region's financial or business interests. Subject to Section 8.2.3, unless required by Applicable Laws, or by an applicable Authority, and subject to the provisions of MFIPPA, OneNet shall not disclose the Region's Confidential Information to any Person in the absence of a direction, in writing, from the Region, to do so.
- 8.2.2 OneNet agrees to identify to the Region, in writing, as required from time to time, any information (“**OneNet's Confidential Information**”) provided by OneNet to the Region in respect of this Agreement pertaining to OneNet and its business where the disclosure of which could prejudice significantly OneNet's competitive position or economic interests or could reasonably be expected to be injurious to OneNet's financial or business interests. Subject to Section 8.2.3, unless required by Applicable Laws, or by an applicable Authority, the Region shall not disclose OneNet's Confidential Information to any Person in the absence of a direction, in writing, from OneNet, to do so.

- 8.2.3 Notwithstanding Sections 8.2.1 and 8.2.2, OneNet may disclose the Region's Confidential Information to OneNet's directors, officers, advisors, employees, agents or representatives who have a need to know without securing prior written consent from the Region and the Region may disclose OneNet's Confidential Information to the Region's members of council, officers, advisors, employees, agents or representatives who have a need to know without securing prior written consent from OneNet.
- 8.2.4 For the purposes of Sections 8.2.4 and 8.2.5, a reference to "Confidential Information" shall refer to both the Region's Confidential Information and OneNet's Confidential Information. Each party shall maintain in strict confidence the other party's Confidential Information and shall return any Confidential Information received from the other party and copies thereof to the other party upon expiry or termination of this Agreement. Each party shall protect the confidentiality of the Confidential Information they receive from the other party to the same extent as it protects the confidentiality of its own confidential information and in no event shall that be less than reasonable and prudent care, but nothing in this Section 8.2 shall prohibit the party (the "Recipient") receiving Confidential Information from disclosing such Confidential Information to those of its Affiliates who have a need to know. Confidential Information shall not include information which:
- a) is previously known to or lawfully in the possession of the Recipient prior to the date of disclosure as evidenced by the Recipient's written record;
 - b) is independently known or discovered by the Recipient, without any reference to the Confidential Information;
 - c) is obtained by the Recipient from an arm's length third party having a bona fide right to disclose same and who was not otherwise under an obligation of confidence or fiduciary duty to the other party or its employees or representatives;
 - d) is or becomes public knowledge through no fault or omission of, or breach of this Agreement by, the Recipient or its employees or representatives;
 - e) is disclosed to a purchaser of either of the parties or a permitted assignee of this Agreement; or
 - f) is required to be disclosed pursuant to a final judicial or governmental order or other legal process.
- 8.2.5 If the Recipient or anyone to whom the Recipient transmits Confidential Information pursuant to this Agreement or otherwise, becomes legally compelled to disclose any Confidential Information, the Recipient will provide the other party with prompt notice so that the other party make seek injunctive relief or other appropriate remedies and/or waive compliance with the provisions of this

Agreement. If the other party is unable to obtain injunctive relief or other remedies, the Recipient will exercise Reasonable Efforts to prohibit the further transmission of the Confidential Information. If both parties are unable to prevent the further transmission of the Confidential Information, the Recipient will, or will use Reasonable Efforts to cause such Person to whom the Recipient transmitted the Confidential Information to furnish only that portion of the Confidential Information, which the Recipient is advised by written opinion of counsel is legally required to be furnished by the Recipient to such Person and exercise Reasonable Efforts to obtain assurances that confidential treatment will be afforded to that portion of the Confidential Information so furnished.

8.3 No Public Announcements, Press Releases etc.

Except as may be otherwise required by Applicable Laws, each party shall obtain the written consent of the other party prior to releasing any public announcements, press releases, sales brochures, advertising or other publicity materials relating specifically to this Agreement in which the name or logo of any other party is used; any such consent shall not be unreasonably withheld or unduly delayed.

8.4 Survival

The provisions of this Article 8 shall survive the expiry or termination of this Agreement.

Article 9 FORCE MAJEURE

9.1 Obligations Suspended in the event of Force Majeure

Except for the payment of any monies required hereunder, which may not be claimed as Force Majeure by the obligated payer, the obligations of the parties shall be suspended to the extent and for the period that the performance is prevented either wholly or partially by reason of Force Majeure provided that the party invoking Force Majeure shall give forthwith written notice to the other party of such inability and provide reasonably full particulars of the cause. If notice is not given forthwith then the party suffering the Force Majeure shall only be relieved from such obligations after the giving of such notice. The party invoking Force Majeure shall use all Reasonable Efforts to remedy the situation and remove the cause of its inability to perform or comply, so far as possible and with reasonable dispatch, provided, however, that settlement of strikes, lockouts and other labour disturbances resulting from and directly related to an event of Force Majeure shall be wholly within the discretion of the party involved. The party invoking Force Majeure shall give prompt notice of the cessation of the event of Force Majeure.

9.2 Limitation on Invoking Force Majeure

Neither party shall be entitled to the benefits of Section 9.1 relating to an invocation of Force Majeure under any or all of the following circumstances:

- a) if the failure to comply with any of the obligations herein imposed upon it was caused by an arrest or restraint by government or governmental agencies or the order of any court and such arrest, restraint or order was the result of a breach by the party claiming suspension of the term of a permit, licence, certificate or other authorization granted by an Authority or under or pursuant to Applicable Laws.
- b) if the failure to perform or comply with any of the obligations herein imposed upon it was caused by the party invoking Force Majeure having failed to use all Reasonable Efforts to remedy the situation and remove, so far as possible and with reasonable dispatch, the cause of its inability to perform or comply with such obligations.
- c) if the failure to perform or comply with any of the obligations herein imposed upon the party was caused by lack of funds or other financial cause for whatever reason.

Article 10 NOTICES

10.1 Address for Notice

Unless otherwise provided herein any demand for consent or otherwise, notice or other communication ("**Notice**") to be given in connection with this Agreement shall be in writing and shall be delivered by pre-paid private courier or otherwise hand-delivered, or transmitted by email or similar means of recorded electronic communications, or by prepaid mail, addressed to the recipient as follows:

If to the Region:

The Regional Municipality of Durham

Attention:

Email:

If to OneNet:

Durham OneNet Inc.

Attention:

Email:

or such other address as a party may advise the other party in writing.

10.2 Deemed Receipt

Any Notice required or permitted to be given hereunder shall be deemed to have been given or received on the day on which it was delivered or emailed, if delivered or emailed on a Business Day during the normal business hours of the recipient, and if not so delivered or emailed, on the next Business Day; or if mailed by prepaid mail as permitted in Section 10.1, on the fourth Business Day following the date of mailing, provided, however, that if at the time of mailing or within three (3) Business Days thereafter there occurs a labour dispute or other event which might reasonably be expected to disrupt the delivery of documents by mail, Notices shall be delivered by prepaid private courier or otherwise hand-delivered or transmitted by email or similar means of recorded electronic communications.

Article 11 MISCELLANEOUS

11.1 Time of the Essence

Time shall be of the essence in respect of this Agreement.

11.2 Waiver

The failure of either party to enforce any of the provisions of this Agreement, or the waiver thereof in any instance, shall not be construed as a general or continuing waiver or relinquishment on its part of any such provision, or of any other provision. No waiver of any provision of this Agreement shall be binding on any party unless consented to in writing by such party.

11.3 Entire Agreement, Amendment

This Agreement constitutes the entire agreement between the parties with regard to the matters herein, and supersedes and replaces all prior representations, negotiations, understanding and agreements, whether oral or written, between the parties with respect to this Agreement. No amendment to this Agreement shall be valid or binding unless set forth in writing and duly executed by both parties.

11.4 Assignment

Except as otherwise specified in this Agreement, neither this Agreement nor any rights, remedies, liabilities or obligations arising under it or by reason of it shall be assignable by either party without the prior written consent of the other party; provided, however, that either party may, without the prior written consent of the other party, assign this Agreement and any of its rights, remedies, liabilities or obligations to: (i) a financial institution for purposes of financing provided that such assignment shall not limit or otherwise affect such party's obligations hereunder and/or (ii) any of the assigning party's Affiliates. The parties agree that in the event of any assignment pursuant to this

Section 11.4, the assigning party shall continue to remain liable for all of its obligations under this Agreement unless released by the other party.

11.5 Relationship of Parties

The relationship between the Region and OneNet is not that of partners, agents or joint venturers of one another. The Region and OneNet, in performing any of their obligations herein, shall be independent contractors or independent parties.

11.6 Governing Law

This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein and shall be treated in all respects as an Ontario contract. Venue of any court proceeding shall be in a court of competent jurisdiction located in Durham Region.

11.7 Severability

The invalidity or unenforceability, in whole or in part, of any provision of this Agreement shall not affect the validity and enforceability of the remainder of it.

11.8 Further Assurances

Each party shall from time to time execute and deliver all such further documents and instruments and do all acts and things as the other party may reasonably require effect the full intent and meaning of this Agreement.

11.9 Successors and Assigns

This Agreement shall enure to the benefit of and be binding upon the parties and their respective successors and permitted assigns and is not intended to confer upon any other Person any rights or remedies hereunder.

11.10 Counterparts

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and all of which such counterparts, together, shall constitute one and the same agreement. Counterparts may be executed in original, facsimile or electronic form, and the parties shall accept any signatures received by facsimile or in electronic form as if they were original signatures of the parties.

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

THE REGIONAL MUNICIPALITY OF DURHAM

I have authority to bind the Region

Name:

Title:

I have authority to bind the Region

Name:

Title:

DURHAM ONENET INC.

I have authority to bind the Corporation

Name:

Title: President