

ORDINANCE NO. 2014-04-045

**AN ORDINANCE APPROVING, AUTHORIZING ENTERING INTO AND EXECUTING AN AGREEMENT TO MAINTAIN CERTAIN OPTICAL FIBER ASSETS**

(Authorizing the Entering Into and Execution of an Agreement with UC2B NFP Providing the City of Urbana the Indefeasible Right to Use Certain Optical Fiber Assets.)

WHEREAS, the City of Urbana (“Urbana”) is an Illinois Municipal Corporation pursuant to the Illinois Constitution of 1970 and the Statutes of the State of Illinois;

WHEREAS, the University of Illinois (“University”) applied for and obtained a grant from the National Telecommunications and Information Administration (“NTIA”) for the purpose of developing, building out, and offering a broadband open access fiber optic network to certain areas of Urbana and the City of Champaign (“Champaign”), including the University, which are deemed underserved areas and to certain institutions identified as “anchor institutions”;

WHEREAS, Urbana, Champaign and the University, in order to create, implement and operate a community-wide open access broadband fiber optic network (hereinafter, “UC2B”) following the University’s receipt of a federal grant for the development and build-out of such broadband network entered into an Intergovernmental Agreement Providing for the Creation of the Urbana-Champaign Big Broadband Consortium;

WHEREAS, Urbana, Champaign and the University have amended the aforesaid initial intergovernmental agreement with a letter of understanding which, subsequent thereto, was more formally memorialized in a First Amended and Restated Intergovernmental Agreement Providing for the Creation of the Urbana-Champaign Big Broadband Consortium;

WHEREAS, as part of the process of developing, implementing and operating UC2B, Urbana, Champaign and the University created a consortium known as the Urbana-Champaign Big Broadband Consortium to which Urbana, Champaign and the University were members;

WHEREAS, Urbana, Champaign and the University have approved a business plan which, *inter alia*, provides for the creation of a not-for-profit corporation to acquire, take possession of, maintain, operate, and repair the assets which have been created, developed and obtained for UC2B through the moneys received in connection with the NTIA grant;

WHEREAS, the NTIA grant has an expiration date of September 30, 2013 by which time a formal legal structure to take over the continuing build-out, operation, maintenance, and repair of the UC2B open access fiber optic network must be created and in place to accept the assets which were developed and/or acquired for, by and on behalf of UC2B in connection with the community-wide build-out of the open access fiber optic broadband network;

WHEREAS, Urbana, Champaign and the University seek to expand the UC2B network to reach additional anchor institutions and the remaining residents of Urbana and Champaign and University-based users;

WHEREAS, in order to undertake the next phase of the UC2B project and because of the expiration of the federal grant, it is necessary for Urbana, Champaign, and the University to approve, enter into and execute a second amendment to their intergovernmental agreement concerning UC2B; and

WHEREAS, the federal government will retain an ownership and/or lien interest in those assets which were created, developed and/or obtained through the moneys received in connection with the for the life expectancy of those assets; and

WHEREAS, a not-for-profit corporation known as Urbana Champaign Big Broadband NFP (“UC2B NFP”) has been created and organized to which rights to use the Consortium’s assets have been transferred; and

WHEREAS, Urbana has previously purchased and paid for the infeasible right to use certain fiber optic assets which were installed or caused to be installed in the cities of Urbana and Champaign and the University of Illinois Urbana-Champaign Campus pursuant to the aforesaid federal grant, but which rights have not heretofore been memorialized in a written instrument; and

WHEREAS, Urbana deems it necessary and appropriate to enter into and memorialize an agreement with UC2B NFP which provides for and assure the maintenance of those fiber optic assets which Urbana has purchased the infeasible right of use in order for it to maintain uninterrupted access to the internet through the fiber optic network system created and installed pursuant to the aforesaid federal grant and as now operated by UC2B NFP; and

WHEREAS, the exhibit appended hereto provides for such aforesaid infeasible right of use memorialization.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Urbana, Illinois, as follows:

**Section 1.**

An Agreement to Maintain Certain Fiber Optic Assets in substantially the form attached hereto and hereby incorporated herein by reference, including attachments and exhibits thereto (hereinafter, “Fiber Maintenance Agreement”), be and the same is hereby authorized and approved.

**Section 2.**

The Mayor of the City of Urbana, Illinois, be and the same is hereby authorized to execute on behalf of the City of Urbana, Illinois and deliver to the City Clerk of the City of Urbana, Illinois, the later being and the same being hereby authorized to attest to said execution of the Fiber Maintenance Agreement as so authorized and approved for and on behalf of the City of Urbana, Illinois.

**PASSED BY THE CITY COUNCIL** this \_\_\_\_\_ Day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Phyllis D. Clark, City Clerk.

**APPROVED BY THE MAYOR OF THE CITY OF URBANA, ILLINOIS** this \_\_\_\_ Day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Laurel Lunt Prussing, Mayor.

## **AGREEMENT TO MAINTAIN CERTAIN FIBER OPTIC ASSETS**

**THIS AGREEMENT TO MAINTAIN CERTAIN FIBER OPTIC ASSETS** (“Maintenance Agreement” or “Agreement”) is entered into on \_\_\_\_\_, 2014 between the Urbana Champaign Big Broadband (“UC2B”), an Illinois Not-For-Profit Corporation, with offices at 713 Edgebrook Drive, Champaign, Illinois (“Grantor”), and the City of Urbana, a municipal corporation, organized under the laws of Illinois, with offices at 400 S. Vine Street, Urbana, Illinois (“Grantee”), each a “Party” and together, the “Parties.”

### **RECITALS**

1. Grantor owns optical fiber network assets constituting a fiber optic network in and around the Urbana-Champaign area (“Network”);
2. The Parties have executed or will execute a separate agreement entitled “Agreement Granting Indefeasible Right to Use Optical Fiber Assets,” (“IRU Agreement”) by which Grantor has granted or will grant to Grantee an indefeasible right to use certain fiber optic strands (“Fiber Assets”) within the Network;
3. The execution of the IRU Agreement is a condition precedent to the operation of this Maintenance Agreement; and
4. Grantor desires to provide, and Grantee wishes to accept from Grantor, certain Maintenance services concerning Fiber Assets and Associated Property, for which Grantee will compensate Grantor in the manner set forth in this Maintenance Agreement.

**NOW, THEREFORE**, 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, Grantor and Grantee agree as follows:

#### **1.0 Definitions**

“Agreement” means this Agreement, any and all Exhibits and Attachments thereto, and any Addenda to which the Parties may agree from time to time.

“Associated Property” means the tangible and intangible property needed for the use of Fiber Assets, including, but not limited to, connecting points, support structures and all underlying rights, but expressly excluding any rights in any electronic or optronic equipment.

“Authorizations” means the permissions a Party must have to perform its obligations under this Agreement (including payment of the Authorization Fees and any other costs to obtain and maintain such permissions), which may include franchises; licenses; permits; zoning approvals; variances; exemptions; grants of authority to use public rights of way or facilities; agreements to make attachments to poles, ducts, conduits, towers, buildings, rooftops, manholes, and the like; and any other approval of a governmental authority or third persons with respect to (i) the construction, installation, repair, maintenance, operation or use of tangible or intangible property, as the case may be, or (ii) any requirement by a governmental authority for the engagement in a business or enterprise.

“Authorization Fees” means all permit, right-of-way, easement, pole attachment, franchise, encroachment, or license fee, charge or assessment of any kind applicable to the placement and maintenance of Fiber Assets and Associated Property and appurtenances, whether imposed by a governmental authority or a private entity.

“Dark Fiber” means fiber optic cable strands without electronic and/or optronic equipment and which is not "lit" or activated.

“Effective Date” means the date on which this agreement was countersigned and executed by the second Party.

“Fiber Assets” means specific Dark Fiber strands which are the subject of the IRU Agreement, as defined in the IRU Agreement.

“Grantee System” means the fiber optic system owned or controlled by Grantee on the Premise Side of the Interconnection Points, including all associated Equipment owned or controlled by Grantee on the Premise Side of the Interconnection Points and Equipment owned or controlled by Grantee on the Network Side.

“Interconnection Point” means a point on one side of which is Grantee’s responsibility for ensuring its connections and paying for and installing its Equipment, termed Premise Side, and the other side of which point is the Network Side, for which Grantor is responsible as set forth in this Agreement.

“IRU Agreement” means that agreement between the Parties entitled “Agreement Granting Indefeasible Right to Use Optical Fiber Assets,” by which Grantor grants to Grantee an indefeasible right to use Fiber Assets.

“JULIE” means the Illinois Joint Utility Locating Information for Excavators service, which provides for a method of notifying owners of underground infrastructure of pending new construction in the area of that infrastructure, so that the existing infrastructure can be located and marked.

“Maintenance” means work that must be performed upon or to Fiber Assets and Associated Property to ensure the continuity of an acceptable signal transmitted through the fibers (in conformance with the manufacturer’s specifications), or to ensure the safety and reliability of the Fiber Assets. Unless otherwise agreed in writing, Maintenance shall not include any work associated with either equipment owned by an entity other than Grantor, or equipment that sends, receives, interprets or modifies a signal or signal data.

“Network” means the Grantor fiber optic cable network (including the fiber optic cable, cable accessories, and related connections) in and around the cities of Urbana and Champaign, Illinois, of which the Fiber Assets are a part.

“Network Side” means the side of the Interconnection Point on which Grantor will provide Fiber Assets in accordance with this Maintenance Agreement, including the splice point applicable thereto, as depicted in Exhibit A of the IRU Agreement.

“Parameters” means the specifications, engineering and design requirements for the Network, including Fiber Assets, Associated Property and related connections, as set forth in Exhibit B of the IRU Agreement.

“Premise Side” means the side of the Interconnection Point on which Grantee or Third Party Equipment as designated by Grantee is connected to Fiber Assets, as depicted in Exhibit A of the IRU Agreement.

## **2.0 Term and Termination**

This Agreement shall continue for a term of twenty (20) years from the Effective Date (“Term”), unless terminated sooner under the provisions of this Agreement. Upon expiration of the initial Term, this Agreement may be renewed upon such terms and conditions as the Parties may agree.

### **2.1 Termination for Cause**

This Agreement is subject to termination for cause by either Party in accordance with the procedures in case of default set forth in Section 9 of this Agreement.

### **2.2 Termination of IRU**

This Agreement shall be deemed terminated upon the termination or expiration of the IRU Agreement.

## **3.0 Maintenance Obligations – Generally**

**3.1** Grantor shall perform Maintenance on Fiber Assets and Associated Property throughout the Term of this Agreement, and shall keep and maintain the Fiber Assets and Associated Property in good working order for the duration of the Term, consistent with commercial standards and manufacturer specifications and the Parameters, and shall otherwise maintain the Fiber Assets and Associated Property in a manner that will permit Grantee’s uninterrupted use, in accordance with the terms and conditions of the IRU Agreement. All Maintenance on or to Fiber Assets and Associated Property shall be performed by Grantor or Grantor’s agent.

**3.2** Unless otherwise agreed by the Parties, Grantee will be solely responsible for providing and paying for any and all other maintenance, in particular the maintenance of electronic, optronic and other equipment, materials and facilities that Grantee uses in connection with the operation of the Fiber Assets. To ensure that such other maintenance does not adversely affect the Fiber Assets and Associated Property, Grantee shall perform such maintenance in a good and workmanlike manner, using good engineering practices and in accordance with current industry standards and applicable law. All maintenance on the Grantee System shall remain the sole responsibility of Grantee.

- 3.3** Grantor shall be responsible for maintaining an active membership in JULIE and shall respond in a timely manner to all requests to locate and mark its underground infrastructure and the Fiber Assets covered by this agreement.
- 3.4** Grantor shall be responsible for acquiring and maintaining at its expense all applicable Authorizations, including state and municipal rights of way, relating to the use and Maintenance of Fiber Assets.

#### **4.0 Access**

On reasonable request to, notice to and consent of Grantee as to a mutually acceptable time, which shall not be unreasonably withheld, conditioned or delayed, Grantor shall be permitted reasonable access to Fiber Assets on the property of Grantee for the sole purpose of fiber testing and repair in connection with an outage of the Network. Grantor personnel and its agents shall, while on the premises of Grantee, comply with all industry standard rules and regulations, and other regulations communicated to Grantor by Grantee including security requirements and, where required by government regulations as disclosed by Grantee, receipt of satisfactory governmental clearances.

#### **5.0 Maintenance Contact**

Grantor shall provide the means, including but not limited to a phone number, to receive and process maintenance-related communications from Grantee on a 24x7x365 basis. Grantor shall designate a single point of contact, who shall be a human person, and who shall have primary responsibility for addressing maintenance-related issues concerning Fiber Assets and Associated Property.

Grantor Maintenance Primary Point of Contact:  
24x7 contact number: 217-366-8222  
Name: William DeJarnette  
Title: Executive Director  
Phone number: 217-366-8222  
Email address: bill@uc2b.net

In addition, each Party shall provide the other Party an escalation list setting forth the names, email addresses and telephone numbers of at least three (3) individuals, in the order that the other Party shall attempt to contact them, for the purpose of receiving Maintenance-related notifications.

Each Party shall promptly inform the other Party of any changes or updates to the contact information required under this subsection.

#### **6.0 Maintenance Activities**

##### **6.1 Scheduled Maintenance**

Grantor shall perform scheduled Maintenance in accordance with Grantor's then-current preventive maintenance procedures, which shall not substantially deviate from standard industry practice. Generally, this work should be scheduled after midnight and before



6:00 a.m. local time. Grantor shall notify Grantee at least five (5) business days prior to the date in connection with any scheduled Maintenance that may reasonably be expected to produce any signal discontinuity or may otherwise affect Fiber Assets or Associated Property.

## **6.2 Emergency and Unscheduled Maintenance**

Any event that occurs without the Grantee's prior knowledge and renders the Fiber Assets unsuitable for Grantee's use as set forth in the IRU Agreement (including a cut cable or other functional outage) shall require an immediate response by Grantor to restore Fiber Assets to good working order ("Emergency Maintenance"), as set forth in this section. Grantor Maintenance on Fiber Assets that is not regular Scheduled Maintenance and is not required in response to an outage shall be considered "Unscheduled Maintenance." Grantor shall notify Grantee as soon as possible after becoming aware of the need for Emergency or Unscheduled Maintenance.

### **6.2.1 Emergency Maintenance**

Grantor shall respond to any event requiring Emergency Maintenance as quickly as possible, shall respond to a request for maintenance from Grantee at least as promptly as it responds to requests from other IRU holders, and shall have its first maintenance personnel at the site requiring Emergency Maintenance within three (3) hours after the time Grantor becomes aware (whether through notification by a Party, a third party, or any other means) of the event requiring Emergency Maintenance, unless delayed by Force Majeure Events. Should Grantor not respond to a call for Emergency Maintenance within three hours or should Grantee have reasonable grounds to believe that Grantor will not respond to a call for Emergency Maintenance within two hours, Grantee may engage service from any vendor approved by the Grantor to undertake a repair at Grantor's cost. Grantor will maintain a list of at least three approved vendors.

## **6.3 Restoration**

When restoring functionality to Fiber Assets, the Parties agree to work together to restore all traffic as quickly as possible. Upon arriving on the site of the event, Grantor shall promptly determine the course of action necessary and commence restoration efforts.

## **6.4 Relocation**

If Grantor is required to relocate any portion of the Fiber Assets or Associated Property due to any condemnation or taking under the power of eminent domain, or for any other reason, Grantor shall immediately provide Grantee written notice. Grantor shall have the right, in good faith, to make a reasonable determination of the extent, timing, and methods to be used to effect such relocation; provided that (i) Grantor shall keep Grantee fully informed of all material determinations that Grantor makes in connection with such relocation, (ii) any affected Fiber Assets and Associated Property shall be relocated and tested in accordance with commercial standards, and (iii) the relocation shall not adversely affect the operations, performance, or points of connection with Customer

networks or with the end points in the Grantee's network. Any and all expenses relating to relocation shall be proportionally allocated among affected IRU holders and Grantor.

## **6.5 Repairs**

In performing repairs, Grantor will comply with the Parameters and other specifications as set forth in Exhibit B of the IRU Agreement.

## **7.0 Subcontracting**

Grantor may subcontract any of its maintenance obligations, provided that Grantor shall require its subcontractor(s) to meet all requirements and procedures set forth in this Agreement. The use of any such subcontractor shall not relieve Grantor of any of its Maintenance obligations.

## **8.0 Compensation**

### **8.1 Amount**

- a) Grantee will pay to Grantor an annual Maintenance Charge in the amount of \$16,170.00, which shall be invoiced by Grantor.
- b) This charge shall be adjusted annually to reflect changes in the Consumer Price Index.
- c) With at least twenty-eight (28) days prior notice, Grantor shall also have the right to adjust the annual Maintenance Charge every third year, on the anniversary of the Effective Date, to reflect significant changes in circumstances so long as all maintenance costs are not increased by more than an additional 5% above the CPI adjustments per three-year increment, are allocated fairly and neutrally on the basis of cost across all IRU holders, and such increases are reasonably related to the costs of maintenance then taking into account the amounts paid by IRU users and the expenses reasonably related to system maintenance updating and replacement.) Grantee shall have the right to review the books and records of the Grantor at least one time per 12-month interval for the purpose of determining the sources and uses of funds used for maintenance.

### **8.2 Invoice and Payment Terms**

Payment of each invoice is due within twenty-eight (28) days of Grantee's receipt of such invoice.

### **8.3 Invoicing and Payment Addresses**

Grantor will send invoices payable by Grantee to the following address:

City of Urbana  
Mayor's Office  
400 S. Vine Street  
Urbana, IL 61801

Grantee will send payments due Grantor to the following address:

Urbana-Champaign Big Broadband, an Illinois Not-for-Profit Corporation  
713 Edgebrook Drive  
Champaign, IL 61820

#### **8.4 Late Payments**

If payment is not received by Grantor from Grantee within fifteen (15) days of when due and payable under this Agreement, then a late fee of the lesser of (i) five percent (5%) per month or (ii) the maximum percentage permitted by law may be assessed on the delinquent balance not paid by the due date. Any such late fee shall be paid within thirty (30) days of receipt of an invoice therefor and shall cover the period commencing with the day on which such payment was due and ending with the day on which such payment is actually received, both inclusive. The payment of any such late fee shall not be deemed an extension of time for payment or a waiver of any failure to remit any other payment due under this Agreement as and when such payment is due. Notwithstanding the foregoing, failure by Grantee to pay an invoice within fifteen (15) days of when due and payable under this Agreement shall be deemed a Default, in which case Grantor may pursue the remedies for breach set forth in Section 12 of this Agreement, in addition to any other rights and remedies available to Grantor under applicable law.

### **9.0 Remedies**

#### **9.1 Default and Cure**

A Default under this Agreement shall occur if (a) a Party fails to perform, in any material respect, any of its obligations set forth in this Agreement, (b) such failure is not excused by any provision of this Agreement, and (c) such failure continues un-remedied for a period of twenty-eight (28) days following receipt of written notice from the non-breaching Party. If the breach by its nature cannot be cured within twenty-eight (28) days and the breaching Party within that time has commenced its cure, there shall be no Default as long as the Party diligently continues such cure to completion.

#### **9.2 Remedies**

Upon the occurrence of a Default, the non-breaching Party shall have the right, subject to the express limitations contained in this Agreement, to terminate this Agreement and to pursue any and all available legal or equitable remedies against the defaulting Party. The non-breaching Party may pursue such remedies simultaneously or consecutively, at its discretion.

## **10.0 Confidentiality**

### **10.1 In General.**

If either Party provides or has provided confidential or proprietary information (“Confidential Information”) designated as such to the other Party, the receiving Party shall hold such information in confidence and shall afford it the same care and protection that it affords to its own confidential and proprietary information (which in any case shall be not less than reasonable care) to avoid disclosure to or unauthorized use by any third party, except as otherwise provided below. This Agreement and its terms shall not be deemed the Confidential Information of both Parties. All Confidential Information, unless otherwise specified in writing, shall remain the property of the disclosing Party and shall be used by the receiving Party only for the intended purposes set forth in this Agreement. Except as otherwise required by law, after the receiving Party’s need for Confidential Information has expired, or upon the reasonable request of the disclosing Party, or promptly following the termination or expiration of this Agreement, the receiving Party shall destroy or return to the disclosing Party all Confidential Information, including all copies of such information, and all notes, summaries, or other writings reflecting Confidential Information. The receiving Party shall not reproduce Confidential Information, except to the extent reasonably necessary to perform under this Agreement, or as otherwise may be permitted in writing by the disclosing Party.

### **10.2 Exceptions**

The foregoing provisions of this section shall not apply to (i) any required disclosures to the NTIA or other government authority, (ii) disclosures required under the Freedom of Information Act and applicable state or local government open records laws, (iii) any Confidential Information or any provisions of this Agreement which becomes publicly available, other than through the Party claiming this exception, or is required to be disclosed by law, (iv) Confidential Information that is independently developed by the receiving Party without breach of any obligation of confidentiality; (v) Confidential Information that becomes available to the Party claiming this exception without restriction from an unrelated third party, or becomes relevant to the settlement of any dispute or enforcement or defense of either Party’s rights under this Agreement, provided that appropriate protective measures shall be taken to preserve the confidentiality of such Confidential Information to the extent permissible in accordance with such settlement or enforcement process; (vi) disclosures of this Agreement to any proposed permitted assignee provided that each such proposed assignee agrees to be bound by confidentiality obligations no less stringent than those set forth herein; or (vii) disclosures by either Party of the physical route of Fiber Assets for marketing and sales-related purposes.

### **10.3 Intellectual Property**

Nothing in this Agreement shall be construed as a grant of any right or license under any copyrights, inventions or patents now or later owned or controlled by Grantee or Grantor, and nothing in this Agreement shall be construed as granting any right, title or interest in the other Party’s trademarks, trade names, service marks or other intellectual property

rights. The Parties agree not to use the trademarks, trade names, or service marks of the other party without prior written permission.

#### **10.4 Survival**

The confidentiality provisions in this section shall survive expiration or termination of this Agreement.

#### **11.0 Assignment**

Grantee shall not assign its rights in this Agreement without the prior written consent of Grantor, which consent shall not be unreasonably withheld. Nothing in this Agreement shall limit Grantor's right to assign its rights. In the event of an assignment by either Party, the assignee must assume all of the rights and obligations of the assigning Party.

#### **12.0 Notices**

All notices, demands and requests required or permitted to be given under the provisions of this Agreement shall be (a) in writing, (b) delivered by facsimile transmission with confirmation of delivery, electronic mail with confirmation of delivery receipt, or sent by overnight commercial delivery service or certified mail, return receipt requested. Notice shall be deemed to have been given on the date of the transmission and receipt of facsimile or electronic mail transmissions, or the delivery date set forth in the records of the delivery service or on the return receipt when addressed as follows:

If to Grantor

Contact: Executive Director  
Mailing Address: 713 Edgebrook Drive, Champaign, IL 61820  
Phone: (217) 366-8222  
Fax:  
Email: [bill@uc2b.net](mailto:bill@uc2b.net)

With a copy to:

Contact: David Krchak, Attorney  
Mailing Address: 30 E. Main, Suite 500, Champaign, IL 61820  
Phone: (217) 351-1500  
Fax: (217) 351-2017  
Email: [krchak@tmh-law.com](mailto:krchak@tmh-law.com)

If to Grantee:

Contact: Mayor  
Mailing Address: City of Urbana, 400 S. Vine Street, Urbana, IL 61801  
Phone: (217) 384-2456  
Fax:  
Email: [lprussing@urbanaillinois.us](mailto:lprussing@urbanaillinois.us)

With a copy to:

Contact: James L. Simon, City Attorney  
City of Urbana  
400 S. Vine Street  
Urbana, IL 61801  
Phone: (217) 384-2464  
Fax: (217) 384-2460  
Email: [jlsimon@urbanaininois.us](mailto:jlsimon@urbanaininois.us)

or in the case of the Grantee to its registered agent and, further to any such other persons or addresses as the Parties may from time to time designate in writing delivered in accordance with this Section.

### **13.0 Indemnification**

To the extent permitted by law, each Party, on behalf of itself and its affiliates, directors, officers, employees, agents, successors, and assigns (“Indemnitor”) agrees to indemnify, defend, protect and hold the other Party and its directors, officers, directors, employees, agents, successors, and assigns (“Indemnified Persons”) harmless from and against any liability arising out of any claims, suits, actions, damages, claims, losses, fines, judgments, costs and expenses (including reasonable attorneys’, accountants’, experts’ fees) of any kind or character (collectively “Claims”) incurred by any Indemnified Persons (a) because of the death of any person, or any injuries or damage received or sustained by any persons or property, which in whole or in part arise on account of the negligent acts or omissions of the Indemnitor in the performance or non-performance of its obligations or exercise of its rights under this Agreement, including any material violation by Indemnitor of any law or permit applicable thereto; (b) under the Workers’ Compensation laws asserted by any other person providing goods or services for or on behalf of any of the foregoing in connection with this Agreement; or (c) arising out of, caused by, related to, or based upon, a contractual or other relationship between such claiming party and the Indemnitor, as it relates to Fiber Assets.

#### **13.1 Additional Indemnity by Grantee**

Additionally, Grantee agrees to indemnify, defend, protect and hold Grantor and its directors, officers, directors, employees, agents, successors, and assigns harmless from any Claims arising out of or resulting (a) from use or operation of the Fiber Assets by Grantee or its agents, or (b) from the provision or interruption of any connectivity, services, or content through the Fiber Assets, or (c) from the use of the Fiber Assets by Grantee’s or its agents’ Customers.

### **13.2 Exceptions**

An Indemnitor's obligations under this section shall not apply to any Claims to the extent caused by the negligence, intentional acts or omissions, willful misconduct, or reckless action by a person claiming indemnification.

### **14.0 LIMITATION OF LIABILITY**

EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL COSTS, LIABILITIES OR DAMAGES, WHETHER FORESEEABLE OR NOT, INCLUDING WITHOUT LIMITATION AS APPLICABLE, ECONOMIC LOSS OR LOST BUSINESS OR PROFITS, INTERRUPTIONS OF SERVICE, OR ANY DELAY, ERROR OR LOSS OF DATA OR INFORMATION, ARISING IN ANY MANNER OUT OF, OR IN CONNECTION WITH, THIS AGREEMENT AND GRANTEE'S PERFORMANCE OR NONPERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT OR TORT (INCLUDING STRICT LIABILITY), ALL CLAIMS FOR WHICH ARE HEREBY SPECIFICALLY WAIVED BY GRANTOR.

### **15.0 Representations and Warranties; Disclaimers**

By execution of this Agreement, each Party represents and warrants to the other that: (a) the Party is duly organized, validly existing and in good standing under the Laws of the jurisdiction of its organization; (b) the Party has full right and authority to enter into and perform this Agreement in accordance with the terms hereof and thereof; (c) the Party's execution, delivery, and performance of this Agreement will not conflict with, violate or result in a breach of (i) any law, regulation, order, writ, injunction, decree, determination or award of any governmental authority or any arbitrator, applicable to such Party, (ii) any of the terms, conditions or provisions of its charter, bylaws, or other governing documents of such Party, (iii) any material agreement to which it is a party, or (iv) any instrument to which such Party is or may be bound or to which any of its material properties or assets is subject; (d) the Party's execution, delivery and performance of this Agreement has been duly authorized by all requisite corporate action; (e) that the signatories for such Party are authorized to sign this Agreement; (f) there are no actions, suits, proceedings or investigations pending, or to the knowledge of the Party, threatened against or affecting the Party of any of its properties, assets or businesses in any court or before or by any governmental authority that could, if adversely determined, reasonably be expected to have a material adverse effect on the Party's ability to perform its obligations under this Agreement; (g) the Party has not received any currently effective notice of any material default; and (h) the Party has not previously been and is not currently, debarred, suspended, or proposed for debarment, declared ineligible, voluntarily excluded from transactions by any federal or state department or agency, or subject to any inquiry, investigation, or proceeding regarding the foregoing.

### **16.0 General Disclaimer**

GENERAL DISCLAIMER. EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, GRANTOR MAKES NO WARRANTY, WHETHER EXPRESS OR IMPLIED, AS TO THE MERCHANTABILITY OR FITNESS FOR A PARTICULAR

PURPOSE OF ANY OF ITS FIBERS, OR ANY SERVICE PROVIDED HEREUNDER OR DESCRIBED HEREIN, OR AS TO ANY OTHER MATTER, ALL OF WHICH ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED.

## **17.0 Taxes**

Each Party shall be responsible for paying its own federal, state or local sales, use, excise, value-added, personal property, income or other taxes or charges assessed on or levied against any transaction or event arising from the performance of this Agreement.

## **18.0 Insurance**

During the term of this Agreement and IRU, each Party shall maintain a policy of comprehensive liability insurance, including public liability, bodily injury, and property damage, written by a company licensed to do business in the State of Illinois, covering use and activity contemplated by this Agreement with combined single limits of no less than One Million Dollars (\$1,000,000.00) per occurrence and Two Million Dollars (\$2,000,000.00) aggregate, with Five Million Dollars (\$5,000,000.00) umbrella coverage. Each Party shall name the other Party, including its officers, employees, and agents, as Additional Insureds for the said purpose and use of this Agreement. Each Party shall also maintain Workers' Compensation insurance to meet the requirements of the Workers' Compensation laws of Illinois where applicable. Certificates of Insurance evidencing such insurance coverage shall be provided to either Party upon the other Party's request.

## **19.0 Relationship of the Parties**

### **19.1 No Joint Venture**

This Agreement is not intended to create, nor shall it be construed to create, any partnership, joint venture, or employment relationship between Grantor and Grantee, and neither Party shall be liable for the payment or performance of any debt, obligations, or liabilities of the other Party, unless expressly assumed in writing. Each Party covenants that it shall not act in a manner that may be construed to be inconsistent with the foregoing nor otherwise act or purport to act on behalf of the other Party except as may be expressly authorized in writing by the other Party. Grantor and Grantee, in performing any of their obligations hereunder, shall be independent contractors or independent Parties and shall discharge their contractual obligations at their own risk subject, however, to the terms and conditions hereof.

## **20.0 Force Majeure**

### **20.1 Force Majeure Events**

Notwithstanding any other provision of this Agreement, neither Grantor nor Grantee shall be liable for any failure or delay in performing its obligations, or for any loss or damage, resulting from any event or circumstance beyond the reasonable control of the Party, including but not limited to an earthquake, hurricane, fire, flood, lightning, sinkhole or other forces of nature, acts of war, terrorism or civil unrest, strikes, lockouts or other



labor unrest, or legal order, government action or application of laws, regulations or codes (“Force Majeure Event”), *provided* that the obligation of the Grantee to pay the Grantor as provided in this Agreement shall be not be diminished by a Force Majeure Event.

## **20.2 Response to Force Majeure**

A Party whose performance is impacted by a Force Majeure Event shall provide reasonable notice to the other Party and shall make commercially reasonable efforts to minimize the impact of the Force Majeure Event on its performance.

## **20.3 Suspension Pending Force Majeure**

The deadline by when a Party must perform an obligation under this Agreement, other than payment of money, shall be postponed by the period of time by which the Party’s ability to perform that obligation is materially prevented or interfered with by a Force Majeure Event.

## **21.0 Applicable Law**

This Agreement will be governed and construed in accordance with the laws of the State of Illinois, without regard to any conflicts of law provisions that would affix jurisdiction in another State, and any dispute arising out of this Agreement shall be filed in a court of competent jurisdiction in Champaign County, Illinois.

## **22.0 Headings**

Headings and captions of this Agreement’s sections and paragraphs are only for convenience and reference. These headings and captions shall not affect or modify this Agreement’s terms or be used to interpret or assist in the construction of this Agreement.

## **23.0 Waiver**

Any right or remedy provided for in this Agreement shall not preclude the exercise of any other right or remedy under this Agreement or under any provision of law, nor shall any action taken or failure to take action in the exercise of any right or remedy be deemed a waiver of any other rights or remedies at the time.

## **24.0 Entire Agreement; Amendments**

This Agreement and the Exhibits constitute the entire agreement between the Parties with respect to the subject matter hereof, and supersede all previous understandings, commitments or representations, whether oral or written, concerning the subject matter. Each Party acknowledges that the other Party has not made any representations other than those that are contained herein. This Agreement may not be amended or modified in any way except by a writing signed by the authorized representatives of the Parties.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

Grantor:

Grantee:

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

State of Illinois        )  
                                  ) ss.  
County of Champaign)

State of Illinois        )  
                                  ) ss.  
County of Champaign)

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

Subscribed and sworn to before me  
this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Notary Public