

OPTICAL FIBER USE AGREEMENT

THIS OPTICAL FIBER USE AGREEMENT (this "Agreement") is made and entered into effect as of this ___ day of _____, 2010 ("Effective Date"), by and between the City of Gahanna, Ohio, an Ohio municipal corporation ("Gahanna") and the Community Improvement Corporation of Gahanna ("CIC"). Gahanna and the CIC are sometimes referred to individually as "Party" and collectively as "Parties."

WITNESSETH:

WHEREAS, Gahanna has an existing optical fiber network ("Fiber Network") that has been laid throughout Gahanna's corporate limits;

WHEREAS, on April 20, 2009, the City of Gahanna passed Ordinance 90-2009 that allowed the Parties to enter into an Optical Fiber Use Agreement;

WHEREAS, Gahanna and the CIC are working cooperatively to enter into a strategic partnership to "light up," improve, and enhance the Fiber Network (the "Venture") for the benefit of the City of Gahanna;

WHEREAS, the CIC has been given the representative capability to contract with a third party network services provider in order to assist the Parties in undertaking the Venture; and

WHEREAS, Gahanna desires to make available to the CIC additional fibers on the Fiber System for exclusive use and access in furtherance of the Venture, and the CIC desires to make use of fibers on the Fiber System in furtherance of the Venture.

NOW, THEREFORE, in consideration of the terms and conditions set forth in this Agreement, the Parties agree as follows:

AGREEMENT

1. **Access to the Fiber Network.** The Fiber Network consists of a fiber backbone as described and defined in the attached Exhibit A ("Backbone Network") and a fiber distribution network which shall be the City's fiber that does not exist within the Backbone Network ("Fiber Distribution Network"). Gahanna shall provide the CIC with exclusive use rights and access to two (2) fibers on the Backbone Network and four (4) fibers on the Fiber Distribution Network within the City of Gahanna for the CIC's use in the Venture.

- a. Upon written request by the CIC, Gahanna shall provide the CIC with exclusive use rights and access to more fibers on the Fiber Distribution Network, contingent upon a determination by Gahanna that the CIC requires more fibers to advance the Venture. Gahanna shall not unreasonably withhold its consent to providing the CIC with the requested fibers.

- b. The CIC shall not, without amendment to this Agreement, have exclusive use or access rights to greater than forty-eight (48) fibers within the Fiber Network during any given time period.
 - c. Should the CIC request that Gahanna provide access to additional fibers on the backbone of the Fiber Network, Gahanna shall consider this request and upon approval by Gahanna, access to the additional requested fibers shall be granted to the CIC subject to the CIC's execution of a fiber use agreement.
 - d. Access to the CIC Network must be constructed according to the specifications of the City of Gahanna and by a company approved by the City of Gahanna.
- 2. **Lateral Connectivity.** The Parties shall jointly endeavor to cause the owners of new commercial and industrial buildings to install lateral conduit and fiber into the Fiber Network. The Parties shall endeavor to participate on a case by case basis to extend the fiber footprint to existing buildings in Gahanna.
- 3. **Payment for Use of Fibers.** The CIC shall compensate Gahanna in the amount of four hundred fifty dollars (\$450.00) annually per fiber being utilized by the CIC on the Fiber Network during the term of this Agreement. The CIC shall also compensate Gahanna for a pro-rata share of the maintenance costs paid by Gahanna to the then current third party maintenance provider of the Fiber Network, based upon the number of fibers on the Fiber Network that the CIC has been given exclusive use and access to. Gahanna may waive, terminate and determine all payments required from the CIC for the use of fibers at its sole discretion.
- 4. **Term.** This Agreement shall commence on the Effective Date and shall have a term of fifteen (15) years from that Effective Date. Every five (5) years the Parties shall convene to discuss this engagement and determine whether mutually agreed upon amendments should be made to this Agreement.
- 5. **Termination.**
 - a. **Default and Right to Cure.** If either Party shall default in the performance of any obligation or material covenant required to be performed under this Agreement, and the defaulting party fails to remedy such default within a period of fifteen (15) days after receipt from the non-defaulting party of written notice to remedy the same, or if such default may not be remedied within such fifteen (15) day period, fails to commence and diligently pursue completion of such remedy then the non-defaulting Party shall have the right to terminate this Agreement
 - b. **Third Party Separation From Fiber Network.** Upon termination, the CIC shall require any third party network service provider that the CIC has engaged to separate from the Fiber Network at a timetable mutually agreed upon between the Parties.

6. **Limitation of Liability.** Gahanna assumes no liability, express or implied, for any claim, demand, action, liability, loss or expense, including attorneys' fees, that may arise from the CIC or a third party as a result of the Venture or the terms this Agreement.
7. **Confidentiality.** By virtue of this Agreement, a Party may have access to information that is confidential to the other Party ("Confidential Information"). A Party's Confidential Information shall not include information that: (i) is or becomes a part of the public domain through no act or omission of the other Party; (ii) was in the other Party's lawful possession prior to the disclosure and had not been obtained by the other Party either directly or indirectly from the disclosing Party; (iii) is lawfully disclosed to the other Party by a third Party without restriction on disclosure; or (iv) is independently developed by the other Party. The Parties agree, unless required by law, not to make each other's Confidential Information available in any form to any third party for any purpose other than the implementation of this Agreement. Neither Party shall be prohibited by this Section from making disclosures to the extent required by law, prior written notice via electronic mail for such disclosure shall be given to the other party prior to such disclosure.
8. **Miscellaneous.**
- a. **Assignment/Transfer.** Unless otherwise specified herein, neither Party may assign/transfer all or part of this Agreement without obtaining the prior written consent of the other Party. Such consent shall not be unreasonably withheld or delayed. Consent shall not be required in the case of a sale of all or substantially all the assets of the assigning/transferring Party or an assignment/transfer to an entity directly or indirectly owning or controlling, owned or controlled by, or under common control with the assigning/transferring Party. The third party accepting the assignment of this Agreement agrees to abide by the terms of this Agreement.
- b. **Notices.** Any notices permitted or required by this Agreement shall be in writing and shall be given or made by hand delivery, certified mail, return receipt requested or by overnight express with written receipt, addressed to the respective Parties as follows:

If to the CIC:
President
Gahanna Community Improvement
Corporation
200 South Hamilton Road
Gahanna, Ohio 43230

If to Gahanna:
Mr. Terry Emery
Service Director, City of Gahanna
200 South Hamilton Road
Gahanna, Ohio 43230

With a Copy to:
Grant Reveal
Department of Technology
200 South Hamilton Road

With a Copy to:
Mr. Tom Weber
Law Director, City of Gahanna
200 South Hamilton Road

Gahanna, OH 43230

Gahanna, Ohio 43230
With a Copy to:
Sadicka White
Department of Planning &
Development
200 South Hamilton Road
Gahanna, OH 43230

- c. **Force Majeure.** Notwithstanding any other provisions in this Agreement, no default, delay or failure to perform on the part of either party shall be considered a breach of this Agreement if such default, delay or failure to perform is shown to be due to causes beyond the reasonable control of the defaulting Party, including but not limited to, causes such as riots, civil disturbances, actions or inactions of governmental authorities or suppliers, epidemics, war, embargoes, severe weather, fire, earthquakes, acts of God or the public enemy, or nuclear disasters.
- d. **Captions.** The subject headings of the various sections of this Agreement are included for purposes of convenience only and shall not affect the construction or interpretation of any of its provisions.
- e. **Counterparts.** This Agreement may be executed in one or more counterparts, all of which shall be considered one and the same agreement, binding on all parties hereto, notwithstanding that all parties are not signatories to the same counterpart.
- f. **Third Party Beneficiaries.** Nothing herein expressed or implied is intended or shall be construed to confer upon or give any person other than the Parties hereto, and their permitted successors and assigns, any rights or remedies under or by reason of this Agreement.
- g. **Entire Agreement.** This Agreement, together with the Exhibits referenced herein, constitutes the entire Agreement and understanding of the Parties and supersedes all prior discussions and agreements relating to the subject matter hereof. This Agreement may be amended or modified only in writing signed by the Parties. Specifically, the previous Indefeasible Right to Use Agreement between the Parties is hereby null and void, as this Agreement is controlling.
- h. **No Waiver.** No term or provision hereof shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the Party claimed to have waived or consented. Any consent by either Party to, or waiver of, a breach by the other, whether express or implied, shall not constitute a consent to, waiver of, or excuse for any other different or subsequent breach.
- i. **Governing Laws; Limitations.** This Agreement is subject to applicable federal laws, federal or state tariffs, if any, and will be governed by the laws of the State of Ohio. Any inconsistency between this Agreement and those regulations, this Agreement shall be deemed amended as necessary to conform to such regulations.

- j. **Venue.** The Parties hereto hereby consent to the exclusive jurisdiction of the courts of the State of Ohio in Franklin County, and the United States District Court for the Southern District of Ohio and waive any contention that any such court is an improper venue for enforcement of this Agreement.
- k. **Partial Invalidity.** If any term or provision of this Agreement operates or would prospectively operate to invalidate this Agreement in whole or in part, then such term or provision only will be void to the extent of such invalidity, and the remainder of this Agreement shall remain in full force and effect; provided, however, that if such term or provision constitutes the essence of this Agreement then this Agreement shall be deemed terminated without such termination constituting a breach hereof.
- l. **Binding Effect.** This Agreement will be binding upon and inure to the benefit of each party and their respective successors and assigns.
- m. **Bankruptcy.** If the CIC shall file a petition in bankruptcy or for reorganization or for an arrangement pursuant to any present or future federal or state bankruptcy law or under any similar federal or state law, or shall be adjudicated as bankrupt or insolvent, or shall make a general assignment for the benefit of its creditors, or shall admit in writing its inability to pay its debts generally as they become due, or if any involuntary petition proposing the adjudication of the CIC as bankrupt, or its reorganization under any present or future federal or state bankruptcy law or any similar federal or state law shall be filed in any court and such petition shall not be discharged or denied within ninety (90) days after the filing thereof, or if a receiver, trustee or liquidator of all or substantially all of the assets of User shall be appointed, then Gahanna may, at its sole option, immediately terminate this Agreement. The termination provisions set forth in Section 9(b) and (c) shall be applicable to this termination.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the Effective Date.

The Gahanna Community Improvement
Corporation

The City of Gahanna

By:_____

By:_____

Print Name:_____

Print Name:_____

Title:_____

Title:_____

EXHIBIT A

Description of Backbone

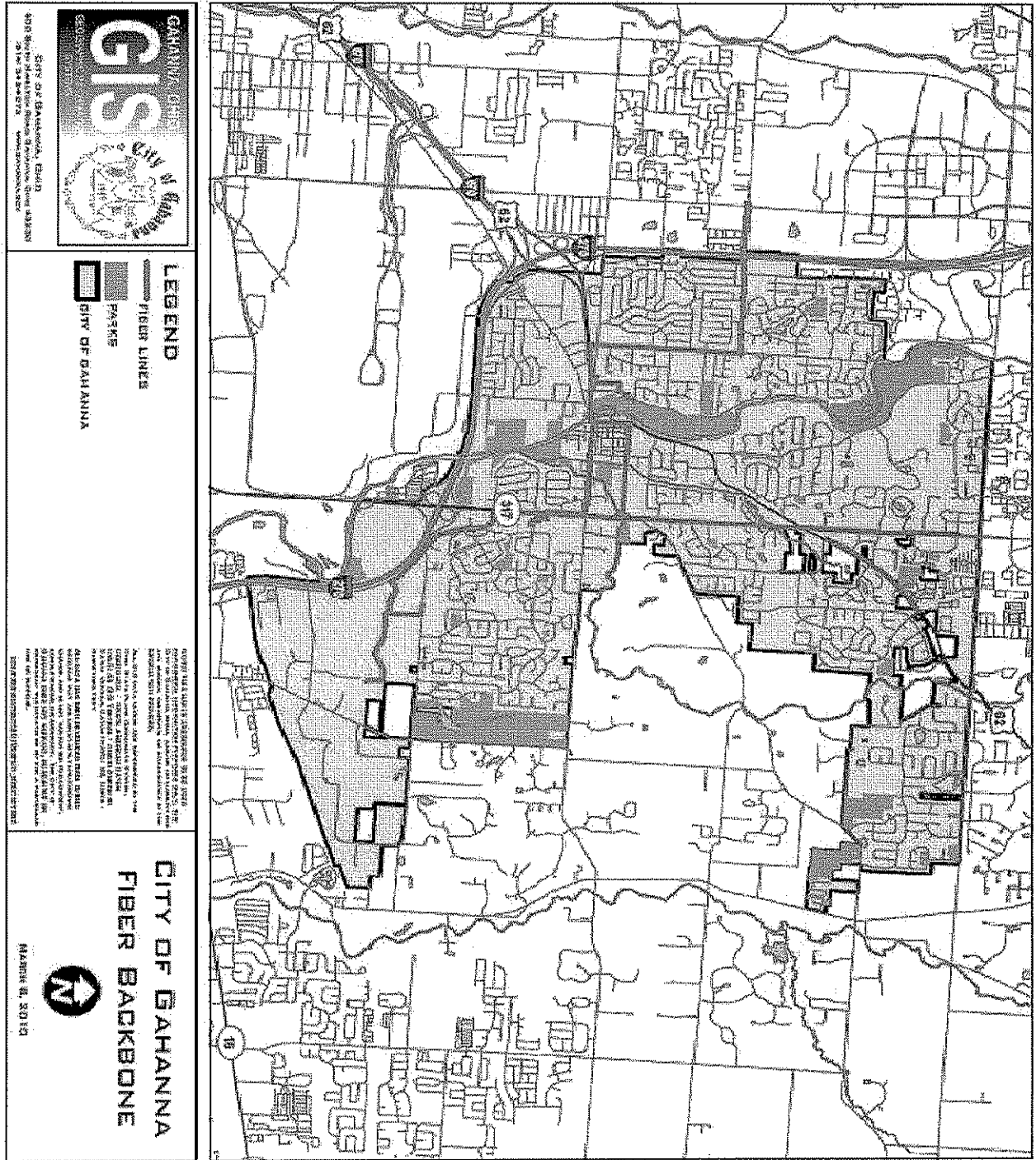


EXHIBIT A

Description of Backbone continued.

Backbone Network: This network consists of fiber optic cabling that exits the City of Gahanna Fiber Network for the purpose of connecting to external networks.

Fiber Distribution Network: This network consists of fiber optic cabling that exists within the City of Gahanna Fiber Network for the purpose of internal network connectivity from within the City of Gahanna Fiber Network.