

CITY OF GAHANNA, OHIO INDEFEASIBLE RIGHT TO USE AGREEMENT

THIS INDEFEASIBLE RIGHT TO USE AGREEMENT (hereinafter referred to as the "Agreement") made and entered into as of this _____ day of _____, 2017, between the City of Gahanna, an Ohio municipal corporation having an office located at 200 S. Hamilton Road, Gahanna, Ohio 43230 (hereinafter referred to as the "Owner"), and Franklin Peak LLC, an Ohio limited liability company (hereinafter referred to as "User"), Owner and User being individually referred to herein as "Party" and collectively as "Parties".

WITNESSETH:

WHEREAS, the Owner has an existing optical fiber system (hereinafter referred to as the "Fiber System") throughout the City of Gahanna, Ohio; and

WHEREAS, the Owner has excess fibers in the Fiber System and is willing, from time to time, to provide for the use of these fibers to third parties;

WHEREAS, the Owner desires herein to grant User an Indefeasible Right of Use (hereinafter referred to as "IRU") in and to certain fibers identified in this Agreement for the purpose of providing telecommunications, video, data, and/or information services; and

WHEREAS, in connection with the grant to User of an IRU in and to such fibers, the Owner is willing to allow User to use certain other property owned by the Owner, including, but not limited to, innerduct, conduit, building entrance facilities and associated appurtenances; and

WHEREAS, User has obtained or shall obtain any and all permits or approvals required to engage in its intended purpose and for the use and occupancy of space in the rights of way, and further agrees to adhere to any and all requirements of federal, state and local laws, rules or regulations (specifically inclusive of, but not limited to, Chapter 931 of the Codified Ordinances of the City of Gahanna, Ohio); and

WHEREAS, in connection with undertaking one or more projects for which the Owner will provide fibers in the Fiber System to User, the Parties have agreed to enter into this Agreement which embodies the mutual covenants and agreements between the Parties hereto; and

WHEREAS, the Parties may in the future agree to enter into additional separate agreement(s) for additional and/or separate optical fiber uses which will incorporate the covenants and agreements of this Agreement and which will also set forth the terms and provisions unique to each additional or different specific project.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, the Parties hereto do hereby agree as follows:

1. DEFINITIONS.

1.1 The following terms, whether in the singular or in the plural, when used in this Agreement and initially capitalized, shall have the meaning specified:

- a. Agreement: This Optical Fiber Use Agreement between the Owner and User which identifies the specific optical fiber strands and facilities to be provided to User by Owner, and which sets forth the associated fees/compensation, terms and conditions for User's use of such optical fiber strands and facilities.
- b. Fiber System: The optical fiber strands, innerduct, conduit, building entrance facilities, associated appurtenances, and capacity owned by the Owner, described herein in the attached Exhibit A.
- c. User System: The optical fiber strands, innerduct, conduit, building entrance facilities, and associated appurtenances in the Fiber System, to be provided to User under the terms of this Agreement as set forth in Section 2, and the associated rights to access such fiber strands at demarcation points as specified herein.

2. GRANT.

The Owner hereby grants to User an Indefeasible Right of Use (IRU) the following Owner Fiber System components:

- a. Two (2) strands of fiber optic cable in the Fiber System, along the Fiber Route described in Exhibit B.

3. TERM.

3.1 This IRU shall have an effective date when fully executed and shall be terminated Fifteen (15) years from the anniversary of that effective date. Thereafter, this Agreement shall automatically renew for additional one (1) year periods so long as neither Party provides the other with at least ninety (90) days advanced written notice of non-renewal prior to the date whereby the Agreement would renew.

4. CONSIDERATION.

4.1 As consideration for, as inducement to, and as a required condition of Owner granting User the specific rights to use portions of the Fiber System as described herein, the User hereby agrees that:

- a. User shall compensate Owner for use of the Fiber System on a per strand basis, as further described in the attached Exhibit C.
- b. Any failure of User to satisfy the terms and conditions of this Agreement shall be

considered a material breach of this Agreement and Owner may, as a result, terminate this Agreement upon giving sixty (60) days written notice to User.

5. OWNER'S OBLIGATIONS.

5.1 Owner shall:

- a. Provide the User System for User's use in accordance with the terms of this Agreement including delivery of the system to a termination point in the planned 50,000 square-foot office building through a conduit constructed by User from a tap-in location currently in the roadway reasonably designated by Owner. The delivery will be scheduled between Owner and User during construction of the planned 50,000 square-foot office building.
- b. Provide and/or control maintenance and repair functions on the User System and all facilities in the Fiber System through which the User System passes, including, but not limited to, conduit, innerduct, poles and equipment, which shall be performed under the direction of the Owner.
- c. Maintain the User System to the User's specifications.

6. USER OBLIGATIONS.

6.1 User shall:

- a. Provide and pay for all lateral connectivity from all necessary termination points of User's proprietary fiber and equipment to all the necessary demarcation points of the Fiber System if such connectivity is necessary.
- b. Pay for any building or external network service connection and disconnection charges for each building service added or deleted before, during or after the initial establishment and cutover of a User System fiber segment. User shall be responsible for any and all costs associated with splicing, distribution segment, service connections, and any ring or concentrator operations.
- c. Pay all necessary costs if the User requires installation of a new distribution ring or concentrator in an already established Fiber System or User System distribution segment, rearrangement of existing service connections, and rearrangement of a ring or concentrator operation.

Agree not to use the User System provided in this Agreement to not provide for or allow any non-related party to use the User System or in any way sublease or subdivide the User System and provide services to non-related or third parties without the prior written consent of the Owner. For purposes of this agreement only, all occupants of the subject property are considered related parties to whom User may provide fiber services. User further agrees to continually meet the requirements of this Agreement. In the event of any breach of the provisions contained in this Section, the Owner has the right to terminate this Agreement

upon giving thirty (30) days advance written notice to User.

- d. Agree to pay its pro rata share of any and all maintenance costs as may be required to be paid by User pursuant to the requirements of Section 8.1(a-c) below.

7. JOINT OBLIGATIONS.

7.1 The Owner and User jointly:

- a. Agree that within thirty (30) days of final execution of this Agreement the Parties will agree upon an Acceptance Plan for User's initial activation and the "go-live" of User's System.
- b. Shall provide each other a twenty-four (24) hour a day, three hundred sixty-five (365) days per year, coordination telephone number.

8. MAINTENANCE.

8.1 All maintenance and repair functions on the User System and all facilities through which the User System passes, including, but not limited to, conduit, innerduct, poles, and equipment, but specifically excluding all User owned and controlled opto-electronics located at Lateral terminus points, shall be performed by or at the direction of the Owner or Owner's appointed agent with reasonable notice to User. Except as otherwise may be agreed to by the Parties, User is prohibited from performing any maintenance or repair on the Fiber System or User System. User shall have the right to have an employee or representative available to assist the Owner in any maintenance or repair of the User System. The Owner shall maintain the User System in accordance with the technical specifications (hereinafter referred to as the "Specifications") attached hereto in Exhibit C.

- a. Regular Maintenance: Owner may from time to time undertake and provide for Regular Maintenance activities in an attempt to keep the Fiber System and/or User System in good working order and repair so that it performs to a standard equal to that which is then commonly believed to be acceptable for systems of similar construction, location, use and type. User agrees to pay the reasonable pro rata share of the regular maintenance costs as determined by and outlined in Exhibit B, Table 1.
- b. Scheduled Maintenance: The Owner from time to time may schedule and perform specific periodic maintenance to protect the integrity of the Fiber System and/or User System and perform changes or modifications to the Fiber System and/or User System (including but not limited to fiber slicing, etc.) at the User's request. Such User requested Scheduled Maintenance shall be performed at the User's sole cost and expense. User may request such Scheduled Maintenance by delivering to the Owner a Statement of Work detailing the service User desires to be performed, including the time schedule for such services. Upon receipt of

such a Statement of Work, the Owner shall provide an estimate of the price and timing of such Scheduled Maintenance. Following User's acceptance of such estimate, the Owner shall schedule and have such Scheduled Maintenance performed. The Owner shall have such Scheduled Maintenance performed on a time-and- materials basis at the standard rates then in effect at the time services are performed.

- c. **Emergency Maintenance:** The Owner may undertake and provide for Emergency Maintenance and repair activities for the Fiber System and/or User System. Where necessary, the Owner shall attempt to respond to any failure, interruption or impairment in the operation of the User System within Twenty-Four (24) hours after receiving a report of any such failure, interruption or impairment. The Owner shall use its best efforts to perform maintenance and repair to correct any failure, interruption or impairment in the operation of the User System when reported by User in accordance with the procedures set forth in this Agreement. The costs and expenses associated with such Emergency Maintenance shall be apportioned between Owner and User in percentages equal to their respective interests of control (based on the terms of this Agreement) over the portions of the User System and/or Fiber System requiring such Emergency Maintenance. The Owner shall have such Emergency Maintenance performed on a time-and- materials basis at the emergency maintenance rates then in effect at the time services are performed.

- 8.2 In the event the Owner, or others acting on the Owner's behalf, at any time during the Term of this Agreement, discontinues maintenance and/or repair of the User System, User, or others acting in User's behalf, shall have the right, but not the obligation, to thereafter provide for the previously Owner-provided maintenance and repair of the User System, at the User's sole cost and expense. Any such discontinuance shall be upon not less than six (6) months prior written notice to User. In the event of such discontinuance, the Owner shall obtain for User, or others acting on User's behalf, approval for adequate access to the rights of way in, on, across, along or through which the User System is located, for the purpose of permitting User, or others acting in User's behalf, to undertake such maintenance and repair of the User System.
- 8.3 In the event any failure, interruption or impairment adversely affects both the Owner's Fiber System and the User System, restoration of the User System shall at all times be subordinate to restoration of the Owner's Fiber System with special priority for Owner's public safety and municipal infrastructure functions carried over the Fiber System, unless otherwise agreed to in advance by the parties hereto. In such event or in the event the Owner is unable to provide timely repair service to the User System, the Owner may, following written request, permit User to make repairs to restore the User System so long as such restoration efforts do not interfere with the Owner's restoration activities.
- 8.4 Any User subcontractors or employees who undertake repair or maintenance work on

the User System shall first be approved by the Owner to work on the Owner's Fiber System. At present, Owner only authorizes User to utilize the services of Columbus Fibernet, LLC (Team Fishel) to undertake repair or maintenance work on the User System. Prior to User's undertaking Emergency Maintenance or entering an Owner's facility for repair, User shall first notify the Owner of the contemplated action and receive the Owner's concurrence decision, a decision that the Owner shall provide to User no later than twelve (12) hours from User's notification to Owner of contemplated action. When User undertakes Emergency Maintenance of the User System, User shall have an Owner employee or representative available to assist the User in any repair of the User System.

9. USE OF THE USER SYSTEM.

9.1 User shall have exclusive control over its provision of telecommunications, video, data, and/or information services.

9.2 User hereby certifies that it is authorized or will be authorized, where required, on the effective date this Agreement to provide telecommunications, video, data, and/or information services within the State of Ohio, the City of Gahanna, Ohio and in such other jurisdictions as the User System may exist, and that such services can be provided on the Fiber optic cable systems such as the Fiber System owned and operated by the Owner.

9.3 User understands and acknowledges that its use of the Fiber System and User System are subject to all applicable local, state and federal laws, rules and regulations, as enacted, either currently or in the future, in the jurisdictions in which the Fiber System and User System are located. User represents and warrants that it shall operate on the Fiber System and User System subject to, and in accordance with, all laws, rules and regulations and shall secure all permits, approvals, and authorizations from all such jurisdictional entities as may be necessary.

10. RELEASE.

10.1 To the extent permitted by law, User shall be solely liable for its own actions that result in any obligation, loss, claim (including third party claims asserted against Owner) and damage whatsoever, regardless of cause thereof, and expenses in connection therewith including, without limitation, expenses, penalties and interest (collectively, "Losses") arising out of or resulting from the entering into this Agreement and any payment, transfer or other application of moneys by User in accordance with provisions of this Agreement; provided, however, that User shall not release Owner for Losses arising out of or resulting from Owner's own willful or negligent conduct. The liability arising under this Section shall survive termination of this Agreement.

11. INSURANCE.

11.1 During the Term of this Agreement, unless otherwise agreed to in writing by the authorized representatives, User shall, at its own expense, maintain in effect insurance

coverage with limits not less than those set forth herein.

- 11.2 The User shall furnish the Owner's authorized representative within thirty (30) days after the Commencement Date of the Agreement with insurance endorsements acceptable to Owner's Director of Law. The endorsements shall be evidence that the policies providing coverage and limits of insurance are in full force and effect. Such insurance shall be maintained by the User at the User's sole cost and expense.
- 11.3 The User endorsements shall name the Owner and all of its elected officials, officers and employees, agents and volunteers as additional insureds. The endorsements shall also contain a provision that the policy cannot be canceled or reduced in coverage or amount without first giving thirty (30) calendar days written notice thereof by registered mail to the Owner at the following address:

City of Gahanna
Attn: City Attorney
200 S. Hamilton Road
Gahanna, Ohio 43230
- 11.4 Such insurance shall not limit or qualify the obligations the User assumed under the Agreement. The Owner shall not by reason of its inclusion under these policies incur liability to the insurance carrier for payment of the premium for these policies.
- 11.5 Any insurance or other liability protection carried or possessed by the Owner, which may be applicable, shall be deemed to be excess insurance and the User's insurance is primary for all purposes despite any conflicting provision in the User's policies to the contrary.
- 11.6 User shall be responsible for all User contractors' or subcontractors' compliance with the insurance requirements.
- 11.7 Failure of the User to maintain such insurance, or to provide such endorsements to the Owner when due, shall be an event of default under the provisions of this Agreement.
- 11.8 The User shall obtain and maintain Commercial General Liability Insurance, including the following coverage: Product liability hazard of User's premises/operations (including explosion, collapse and underground coverage); independent contractors; products and completed operations (extending for one (1) year after the termination of this Agreement); blanket contractual liability (covering the liability assumed in this Agreement); personal injury (including death); and broad form property damage. Such coverage shall provide coverage for total limits actually arranged by the User but not less than Two Million Dollars and No Cents (US\$2,000,000.00) combined single limit. Should the policy have an aggregate limit, such aggregate limits should not be less than double the combined single limit and be specific for this Agreement. Umbrella or Excess Liability coverage may be used to supplement primary coverage to meet the required limits. Evidence of such coverage shall be in a form acceptable to the

Owner's Director of Law.

- 11.9 The User shall provide Workers' Compensation insurance covering all of the User's employees in accordance with the laws of the state of Ohio.
- 11.10 The User may use an Umbrella or Excess Liability coverage to net coverage limits specified in the Agreement. Evidence of Excess Liability shall be in a form acceptable to Owner's Director of Law.
- 11.11 The foregoing insurance requirements are not intended to and shall not in any manner limit or qualify the liabilities and obligations assumed by the User under this Agreement.

12. DEFAULT.

- 12.1 Unless otherwise specified in this Agreement, User shall not be in default under this Agreement, or in breach of any provision hereof unless and until the Owner shall have given User written notice of a breach and User shall have failed to cure the same within thirty (30) days after receipt of a notice; provided, however, that where such breach cannot reasonably be cured within such thirty (30) day period, if User shall proceed promptly to cure the same and prosecute such curing with due diligence, the time for curing such breach shall be extended for a reasonable period of time to complete such curing. Upon the failure by User to timely cure any such breach after notice thereof from the Owner, the Owner shall have the right to take such action as it may determine, in its sole discretion, to be necessary to cure the breach or terminate this Agreement or pursue such other remedies as may be provided at law or in equity.
- 12.2 Unless otherwise specified in this Agreement, the Owner shall not be in default under this Agreement or in breach of any provision hereof unless and until User shall have given the Owner written notice of such breach and the Owner shall have failed to cure the same within thirty (30) days after receipt of such notice; provided, however, that where such breach cannot reasonably be cured within such thirty (30) day period, if the Owner shall proceed promptly to cure the same and prosecute such curing with due diligence, the time for curing such breach shall be extended for a reasonable period of time to complete such curing. Upon the failure by the Owner to timely cure any such breach after notice thereof from User, User shall have the right to take such action as it may determine, in its sole discretion, to be necessary to cure the breach or terminate this Agreement or pursue other remedies as may be provided at law or in equity.
- 12.3 If User 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 User, 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 the Owner may, at its sole option, immediately terminate this Agreement.

13. FORCE MAJEURE.

13.1 Neither Party shall be liable to the other for any failure of performance under this Agreement due to causes beyond its control (except for the fulfillment of payment obligations as set forth herein), including, but not limited to: acts of God, fire, flood, earthquake or other catastrophes; adverse weather conditions; material or facility shortages or unavailability not resulting from such Party's failure to timely place orders therefore; lack of transportation; national emergencies; insurrections; riots, wars; or strikes, lockouts, work stoppages or other labor difficulties (collectively, "Force Majeure Events").

14. ASSIGNMENT.

14.1 This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors or assigns; provided, however, that no assignment hereof or sublease, assignment or licensing (hereinafter collectively referred to as a "Transfer") of any rights or obligations hereunder shall be valid for any purpose without the prior written consent of each Party hereto, not to be unreasonably withheld.

15. WAIVER OF TERMS OR CONSENT TO BREACH.

15.1 No term or provision of this Agreement shall be waived and no breach excused, unless such waiver or consent shall be in writing and signed by a duly authorized officer of the Party claimed to have waived or consented to such breach. Any consent by either Party to, or waiver of, a breach by the other Party shall not constitute a waiver of or consent to any subsequent or different breach of this Agreement by the other Party, and such failure to enforce shall not be considered a consent to or a waiver of said breach or any subsequent breach for any purpose whatsoever.

16. RELATIONSHIP NOT A PARTNERSHIP OR AN AGENCY.

16.1 The relationship between User and the Owner shall not be that of partners or agents for one another and nothing contained in this Agreement shall be deemed to constitute a partnership, joint venture or agency Agreement between the Parties hereto.

17. NO THIRD-PARTY BENEFICIARIES.

17.1 This Agreement is for the sole benefit of the Parties hereto and their respective permitted successors and assigns and shall not be construed as granting rights to any person or entity other than the Parties, or imposing on either Party obligations to any person or entity other than a Party.

18. EFFECT OF SECTION HEADINGS.

18.1 Section headings appearing in this Agreement are inserted for convenience only and shall not be construed as interpretations of text.

19. NOTICES.

19.1 Any written notice under this Agreement shall be deemed properly given, if sent by registered or certified mail, postage prepaid, or by nationally recognized overnight delivery service or by facsimile to the address specified below, unless otherwise provided for in this Agreement:

If to User to: Franklin Peak LLC

If to Owner to: Director of Planning & Development
City of Gahanna
200 S. Hamilton Road
Gahanna, Ohio 43230

With a Copy to: City Attorney
City of Gahanna
200 S. Hamilton Road
Gahanna, Ohio 43230

19.2 Either Party may, by written notice to the other Party, change the name or address of the person to receive notices pursuant to this Agreement.

20. SEVERABILITY.

20.1 In the event any term, covenant or condition of this Agreement, or the application of such term, covenant or condition, shall be held invalid as to any person or circumstance by any court having jurisdiction, all other terms, covenants and conditions of this Agreement and their application shall not be affected thereby, but shall remain in force and effect unless a court holds that the invalid term, covenant or condition is not separable from all other terms, covenants and conditions of this Agreement.

21. COMPLIANCE WITH LAW.

21.1 Each Party hereto agrees that it will perform its respective rights and obligations hereunder in accordance with all applicable laws, rules and regulations.

22. GOVERNING LAW AND VENUE.

22.1 This Agreement shall be interpreted in accordance with the Charter and Codified Ordinances of the City of Gahanna, as amended, the laws of the State of Ohio, and all applicable federal laws, rules and regulations as if this Agreement were executed and performed wholly within the State of Ohio. No conflict of law provisions shall be invoked so as to use the laws of any other jurisdiction. The exclusive venue for all cases or disputes related to or arising out of this Agreement shall be the state and federal courts in Franklin County, Ohio.

23. ENTIRE AGREEMENT.

23.1 This Agreement, including any Exhibits attached hereto, constitute the entire agreement between the Parties with respect to the subject matter discussed herein. This Agreement cannot be modified except in writing and signed by both parties.

IN WITNESS HEREOF the parties have executed and delivered this Agreement effective the day and year first above written:

USER:
Franklin Peak LLC

By:
Its:

Approved as to Form:

OWNER:
City of Gahanna, an Ohio municipal corporation

City Attorney
City of Gahanna, Ohio

By: Thomas R. Kneeland
Its: Mayor

EXHIBIT A
Fiber System

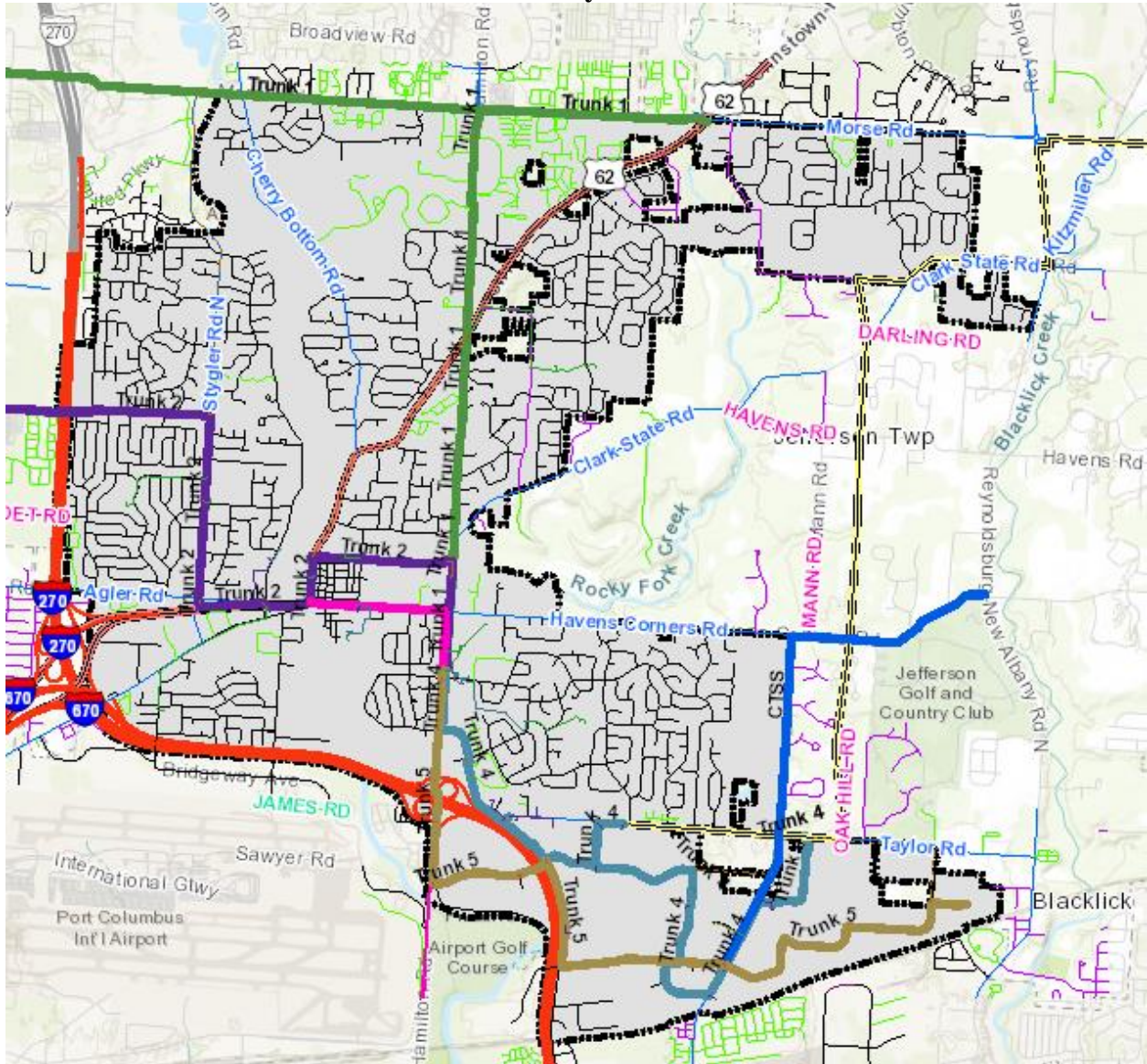


EXHIBIT B
Fiber Route



EXHIBIT C
Pricing – Per Strand

The following fees will be assessed for fibers defined in this IRU

Maintenance Fee Schedule: \$126.39 per strand to cover fiber maintenance and emergency restoration services. These fees are considered the pro rata shares for maintenance and management of the number of fiber strands requested by and assigned to the User.

- Total Annual Maintenance Fee: \$252.78

Bond Repayment Fee Schedule: \$437.33 per strand to cover the pro rata shares of the fiber bond repayment services.

- Total Annual Bond Repayment Fee: \$874.67

Total Annual Expense for Maintenance and Bond Repayment Fees: \$1,127.45