

SPONSOR: Heath Stewart

ORDINANCE NO. 130-07

AN ORDINANCE AUTHORIZING THE CITY TO ENTER INTO AN AGREEMENT BETWEEN THE CITY OF JACKSON, OHIO, AND THE CHILlicothe TELEPHONE COMAPANY, FOR FIBER CAPACITY AND RIGHT-OF-WAY, AND DECLARING AN EMERGENCY.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF JACKSON, STATE OF OHIO, as follows:

Section One. The Mayor and/or his designated representative is authorized to enter into an Agreement between the City of Jackson, Ohio, and The Chillicothe Telephone Company, an Ohio corporation, for an Agreement to provide Fiber Capacity and Right-of-Way. A copy of the Agreement is attached hereto as Exhibit "A".

Section Two. This Ordinance is hereby declared to be an emergency Ordinance necessary for the immediate preservation of the public peace, health, or safety of the City of Jackson, in that it is necessary to enter into this agreement as soon as possible in order to timely commence the Fiber Capacity project. Therefore, this Ordinance shall go into effect upon passage and approval by the Mayor, as provided in Ohio Revised Code Section 731.30.

Section Three. In the event this Ordinance receives a majority vote for passage but fails to receive the required number of votes to pass as an emergency, then this Ordinance shall be deemed to have passed but with no emergency clause and shall take effect at the earliest time permitted by law.

Section Four. It is hereby found and determined that all formal actions of this Council relating to the adoption of this Ordinance were adopted in an open meeting of this Council, and that the deliberations of this Council that resulted in such formal actions, were in a meeting open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

Date: 9-24-07

Reveed B. Spearman
PRESIDENT OF COUNCIL

QuaBrem
CLERK OF COUNCIL

Approved:

Date: 9-25-07

[Signature]
MAYOR

EXHIBIT "A"

FIBER CAPACITY AND RIGHT-OF-WAY AGREEMENT

This Agreement is made and entered into as of the ___ day of September, 2007, by and between the City of Jackson, Ohio, a political subdivision of the State of Ohio (the "City"), and The Chillicothe Telephone Company, an Ohio corporation ("Chillicothe").

WHEREAS, the City is in the process of deploying a network of 24-count fiber cable that will connect the City's power plant, current sub-station and new sub-station (the "Initial Build");

WHEREAS, Chillicothe is willing to reimburse the City for out of pocket expenses incurred to date on the Initial Build ("Reimbursed Expenses"), and to assume the costs to complete the Initial Build as set forth on the construction contract attached to this Agreement as Exhibit A (the "Contract"); and

WHEREAS, Chillicothe desires to own and maintain the fiber cable within the Initial Build and the City desires to obtain the right to use dark fiber capacity within the Initial Build;

NOW, THEREFORE, for and in consideration of the promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Initial Build**. Within five business days after receipt of reasonable documentation (including invoices from the contractor), Chillicothe shall pay the City the Reimbursed Expenses. Chillicothe further agrees to pay the remainder of the costs necessary to complete the Initial Build, as set forth in the Contract. The City hereby transfers and assigns to Chillicothe all right, title and interest to all of the fiber cables and conduits within the Initial Build.
2. **Additional Build**. From time to time, Chillicothe may request of the City to locate additional fiber cable within the City (either above or below ground) or on utility poles owned by the City that are outside the City (the "Additional Build"). At that time, Chillicothe will present the City with a plan of the fiber cable routes that it requests to build in the Additional Build (the "Additional Build Plan") and shall be attached to this agreement as Exhibit C (the "Additional Build"). Chillicothe will offer the City the use of six dark fibers in all sections of the Additional Build, under the same terms as the Initial Build. The City has the right to accept the offer for the six dark fibers in return for free pole contacts for Chillicothe on the section of cable in which the City requests the dark fibers. The City will provide a written request for the dark fibers (Exhibit C-1), if desired, and a written acknowledgement of consent for the Additional Build (Exhibit C-2), of which consent may not be unreasonably withheld, conditioned or delayed. Whenever Chillicothe, in the Additional Build, is attaching cable to City owned utility poles, Chillicothe will be responsible for all reasonable "make ready" costs (Exhibit C-3) in connection therewith and agrees to reimburse the City for all pole contacts at the then current rates (Exhibit C-4). The Additional Build length of term of shall be coterminous with the Fiber Capacity and Right of Way agreement.
3. **Lease of Dark Fiber**. During the twenty (20) years from and after the date of this Agreement (the "Term"), Chillicothe hereby grants to the City the right to use, subject to the limitations described below, six strands of dark fiber (3 fiber pairs) ("Dark Fibers") in and through the fiber which was part of the Initial Build, except that the City shall not have the right to use any strands in any "customer drop" portion of the Initial Build or the Additional Build. At all times during the Term and thereafter, title to the Dark Fibers shall continue to be held by Chillicothe. Chillicothe makes no representations or warranties, express or implied, regarding the Dark Fibers, including, without limitation, any warranties as to transmission capacity, merchantability or fitness for the use intended. The City agrees that Chillicothe will have no liability or obligation with respect to the City's use of the Dark

Fibers. The City recognizes and acknowledges that the City will be responsible for purchasing, leasing, installing, maintaining and operating any and all equipment and electronics necessary for the City to use the Dark Fibers. There will be no charge to the City for the use of the Dark Fibers during the Term. Additionally, during the Term, Chillicothe will be responsible for maintaining and repairing the Dark Fibers in accordance with its internal procedures and customary industry standards. The City is prohibited from performing any maintenance and repair on the Dark Fibers. The City agrees that the equipment and electronics utilized by the City in connection with the Dark Fibers shall not interfere with or impair any of the services or facilities owned, leased or operated by Chillicothe in connection with the Initial Build or the Additional Build.

4. **City Cooperation.** The City agrees to provide reasonable cooperation and assistance in Chillicothe's efforts to deploy and construct the Initial Build and the Additional Build using the Right-of-Way Rights (defined below). The City also agrees that it will not charge Chillicothe any pole contact fees or other fees for any cable that is connected to any poles owned by the City, as a part of the Initial Build.

5. **City's Permitted Uses.** The City may only use the Dark Fibers for its own administrative and support purposes for the conduct of City business and the operation of City utilities and only to the extent that such uses do not compete with Chillicothe's efforts to provide telecommunications services (including, but not limited to, voice, video and data services) to the businesses, organizations and residents of the City and the surrounding area. In addition, the City may only use the Dark Fibers in connection with the City's utilities as long as such utilities remain solely owned by the City. The City may not sublease or otherwise transfer or assign its right to use the Dark Fiber to any third party. Chillicothe is not limited in what it may do with the remaining fibers (18 fibers remaining out of 24-count fiber), including without limitation, Chillicothe may provide telecommunications services (including, but not limited to, voice, video and data services) to the businesses, organizations and residents of the City and the surrounding area.

6. **Grant of Building Placement and Right-of-Way Rights.** During the Term, the City hereby grants to Chillicothe the full right and privilege to place a Horizon owned prefabricated electronics service building no larger than 12' x 20' on or near city sub-station property as per attachment Exhibit B and to use all of the rights-of-way, easements, licenses, pole attachment agreements and similar rights which the City now holds or hereafter acquires, for the purpose of Chillicothe's construction and deployment of the Initial Build and the Additional Build (the "Right-of-Way Rights"). After the initial construction of the Initial Build and the Additional Build, Chillicothe shall have the continuing right of access for the purpose of operating, inspecting, testing, repairing, maintaining, moving and upgrading the network of fiber cable within the Initial Build and the Additional Build. It is the intent and agreement of the parties that Chillicothe's use of the Right-of-Way Rights will not require Chillicothe to apply for or obtain any additional permits or licenses from the City for the construction of the Initial Build and the Initial Build along such rights-of-way. There will be no charge to Chillicothe for the use of the Right-of-Way Rights. The City represents and warrants that it has the right to grant the Right-of-Way Rights and that such grant does not violate any agreement, lease, license or other document with any third party, nor does it otherwise violate the rights and interests of third parties. The City shall use its best efforts to retain all of its Right-of-Way Rights throughout the Term. The City will give Chillicothe at least ninety (90) days prior written notice before the City loses its underlying rights with respect to any of the Right-of-Way Rights. The City agrees that it will not grant any rights to third parties which have the effect of interfering with Chillicothe's use of the Right-of-Way Rights.

7. **Indemnification.** Each party agrees to indemnify and hold the other party harmless from and against any and all liabilities, claims, losses, costs and expenses (including without limitation reasonable attorneys fees) incurred or suffered by the other party as a result of any breach of the terms

and conditions of this Agreement or from the acts or omissions of such party in the performance or non-performance of this Agreement.

8. **Notices.** All notices and communications concerning this Agreement shall be sent by personal delivery, or certified or registered U.S. mail, return receipt requested or by Federal Express, UPS or other nationally recognized overnight courier to the address specified in the first paragraph of this Agreement. All notices shall be effective upon receipt or refusal of receipt by the addressee.

9. **End of Term.** At the end of the Term, Chillicothe shall have a period of 60 days to make satisfactory arrangements with regard to the fiber cable contained within the Initial Build and the Additional Build.

10. **Assignment.** Neither party may assign, transfer or convey its rights or interests under this Agreement, nor delegate its obligations under this Agreement; provided, however, that Chillicothe may assign this Agreement in full to an affiliate of Chillicothe or to a purchaser or successor of all or substantially all of Chillicothe's assets, with prior written notice to the City (but without the requirement of consent), if such affiliate or purchaser agrees in writing to be bound by the terms and conditions of this Agreement.

11. **Miscellaneous.** The relationship of the parties hereunder shall always and only be that of independent contractors, and shall not be construed to be a partnership or joint venture. Neither party shall have the right to obligate the other party in any manner, by contract or otherwise. Each party represents that it has the full power and authority to enter into and perform this Agreement and that the person signing this Agreement on behalf of such party has been properly authorized and empowered to enter into this Agreement. In the event any of the provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the unaffected provisions of this Agreement shall be unimpaired and remain in full force and effect. The City and Chillicothe shall negotiate in good faith to substitute for such invalid, illegal or enforceable provisions a mutually acceptable provision consistent with the original intention of the parties hereto. This Agreement, including its Exhibits, constitutes the entire agreement between the parties with respect to the subject matter hereof. This Agreement may not be modified except in writing signed by both parties. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio, without reference to conflict of laws and principles.

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

THE CITY OF JACKSON

By: _____
Name: _____
Title: _____

THE CHILLICOTHE TELEPHONE COMPANY

By: _____

Name: _____
Title: _____

EXHIBIT A

CONSTRUCTION CONTRACT