

A Resolution Approving and Authorizing a Fiber License Agreement with IFiber Networks LLC

WHEREAS, the Village Board of Trustees of the Village of Gilberts and IFiber Networks LLC desire to enter into an agreement to allow development of a network of fiber optic cables to provide high speed internet within in the Village (“Fiber Optic Network”).

THEREFORE, BE IT RESOLVED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF GILBERTS AS FOLLOWS:

Section 1. Recitals. The recitals set forth above are hereby incorporated into and made a part of this Resolution as though set forth in this Section 1.

Section 2. Approval; Authorization. The Fiber License Agreement between the Village of Gilberts and IFiber Networks LLC is hereby approved in substantially the form attached to this Resolution as Exhibit A. The Village President and Village Clerk is hereby authorized and directed to execute and attest to the Fiber License Agreement on behalf of the Village.

Section 3. Effective Date. This Resolution shall be in full force and effect after its approval in the manner provided by law.

ADOPTED THIS 18th DAY OF July, 2017, pursuant to roll call vote as follows:

	<u>Ayes</u>	<u>Nays</u>	<u>Absent</u>	<u>Abstain</u>
Trustee Jeanne Allen	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Trustee Dan Corbett	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Trustee Nancy Farrell	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Trustee Louis Hacker	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Trustee Elissa Kojzarek	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Trustee Guy Zambetti	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
President Rick Zirk	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

APPROVED THIS 18th DAY OF July, 2017



Village President, Rick Zirk




 Village Clerk, Debra Meadows

Published: July 19th, 2017

FIBER OPTIC LICENSE AGREEMENT

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18 THIS FIBER OPTIC LICENSE AGREEMENT (this "Agreement") dated as of this day of July, 2017, ("Execution Date") between the Village of Gilberts, an Illinois municipal corporation ("Village"), and IFiber Networks LLC, an Illinois limited liability company, doing business as Fosiva ("Fosiva"). The Village and Fosiva are at times collectively referred to hereinafter as the "Parties" or individually as the "Party."

WHEREAS, Fosiva desires to develop a network of fiber optic cables to provide high-speed internet within the Village ("Fiber Optic Network"); and

WHEREAS, the Village has agreed to permit Fosiva to install fiber optic conduit, buffer tubes, and cables within certain portions of the right-of-way under the control of the Village ("Right-of-Way Fiber"); and

WHEREAS, the Village has also agreed to grant Fosiva limited access to the Village's Public Works Building located at 73 Industrial Drive, Gilberts, to install a single vertical 19 inch rack cabinet in the upstairs storage room, along with related equipment for fiber and electrical connections ("Hardware"); and

WHEREAS, the parties have agreed to enter into this license agreement to set forth the terms and conditions for the license granted pursuant to this Agreement; and

NOW THEREFORE, in consideration of the recitals, mutual covenants, and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby mutually agree as follows:

1. **Grant of License for Right of Way Fiber.** Subject to the terms of this Agreement, the Village hereby grants to Fosiva, and Fosiva hereby accepts, a non-exclusive revocable limited use license ("License") to access the Village's right-of-way (referred to as the "Licensed Premises"), for the sole purpose of constructing and maintaining the Right-of-Way Fiber. Fosiva shall complete the installation and construction of the Right-of-Way Fiber in a lien-free, workmanlike manner pursuant to permits issued by the Village. Fosiva shall keep the Right-of-Way Fiber and the Licensed Premises at all times in the proper condition for their intended use and shall be solely responsible for any and all injuries or damage caused by Fosiva's failure to do so. The Village reserves the right to use the Licensed Premises in any manner that will not prevent, impede, or interfere with the exercise by Fosiva of the rights granted by this Agreement. Fosiva acknowledges that this License is for the sole and exclusive benefit of Fosiva.
2. **Grant of License for Hardware.** Subject to the terms of this Agreement, the Village hereby grants to Fosiva, and Fosiva hereby accepts, a non-exclusive revocable limited use license ("License") to maintain the Hardware in the Village's Public Works Building. Fosiva shall keep the Hardware at all times in the proper condition for its intended use and shall be solely responsible for any and all injuries or damage caused by Fosiva's failure to do so. The Village reserves the right to use the Public Works Building in any manner that will not prevent, impede, or interfere with the exercise by Fosiva of the rights granted by this Agreement. Fosiva acknowledges that this License is for the sole

and exclusive benefit of Fosiva. The License granted by this Section to allow the Hardware to be maintained in the Public Works Building shall terminate if the Village sells or transfers ownership of the Public Works Building or if the Public Works Building is otherwise unavailable for the Hardware use.

3. **Conveyance.** In consideration of the License granted to Fosiva by the Village to install and maintain the Right-of-Way Fiber, Fosiva hereby agrees to convey the following to the Village:

- A. Two tubes of 12-count strands of multimode fiber (total of 24 strands) within all existing fiber backbone that has been installed (as depicted on Exhibit A) or will be installed in the Village by Fosiva. A portion of this fiber/conduit installation is located outside municipal boundaries from the intersection of Randall Rd. west on Rt. 72 into the Village.
- B. The conduit, including the outer jacket of aerial cable and the buried tubular material the fiber is passed through underground.

Upon conveying the buffer tubes and conduit required under this Section 3, Fosiva shall execute and submit to the Village a bill of sale and an affidavit of title, attesting that the buffer tubes and conduit are not subject to any liens and encumbrances which are not approved by the Village. Fosiva shall execute and submit to the Village a bill of sale and an affidavit of title for the existing buffer tubes and conduit to be conveyed to the Village under Section 3(A)(1) within 14 days of the effective date of this Agreement for that portion already installed and within 30 days after installation of any future Fiber.

4. **Fosiva's Continued Obligations.** In consideration of the License granted to Fosiva by the Village to install the Right-of-Way Fiber, Fosiva hereby agrees to provide the following services throughout the term of this Agreement:

- A. **Maintenance and Repair of the Right-of-Way Fiber and Hardware.** Fosiva shall construct, install, operate, maintain, and repair the Right-of-Way Fiber, including the buffer tubes conveyed to the Village under Section 3(A)(1), and the Hardware in a good and workmanlike manner at its sole cost, risk, and expense. Fosiva shall be solely responsible for maintaining the Right-of-Way Fiber, including the buffer tubes conveyed to the Village under Section 3(A)(1), and the Hardware. Fosiva will ensure that response time for maintenance and repair will be four hours or less, except for good cause shown.
- B. **Utility Costs.** Fosiva shall be responsible for any and all electricity or other utility costs, fees, or other charges relating to the Right-of-Way Fiber or the Hardware.

5. **Consideration.** In consideration for Fosiva's conveyance of Fiber under Section 3 and its continued obligation to maintain and repair the Fiber under Section 4, the Village agrees to pay to Fosiva \$300.00 from the utility fee that is part of the permit fees that are imposed on and actually collected from homes within the Conservancy subdivision up to a maximum amount of \$170,000.00. Payment shall be made to Fosiva on a quarterly

basis. The Village's payment obligation under this Section 5 shall be limited to those fees actually collected by the Village after the effective date of this Agreement from the utility fees paid at the time of building permit for a home in the Conservancy subdivision, and shall not be backed by the full faith and credit of the Village nor shall it be a general obligation debt of the Village.

6. **Cable or Video Franchise.** This agreement does not provide authorization to Fosiva to provide cable or video services within the Village. Should Fosiva desire to provide cable or video services in the Village, it would need to enter into a local franchise agreement with the Village or obtain approval of a state franchise.

7. **Term.** Unless earlier terminated in accordance with Section 8 hereof, this Agreement will expire at the end of twenty (20) years from the Execution Date, renewable by mutual agreement of the parties for five year terms. Upon the expiration of this Agreement, Fosiva shall remove the Hardware and restore the Licensed Premises, at its sole cost and expense, as nearly as practicable to the condition immediately preceding the installation of the Hardware.

8. **Termination.**

A. **Termination by the Village.** Notwithstanding anything to the contrary in this Agreement, the Village may terminate this Agreement, in whole or in part, by providing Fosiva 10 days prior written notice of one of the following conditions:

- (1) If Fosiva fails to comply with any of the terms, conditions, or limitations set forth in this Agreement and does not cure such failure within 10 days of prior written notice; or
- (2) If Fosiva violates any applicable federal, state, county, or Village law, ordinance, rule, or regulation; or
- (3) If the Village, in its sole discretion, determines that a public need or purpose exists that requires the termination of this Agreement or that there is a safety concern resulting from activities undertaken pursuant to this Agreement; or
- (4) If Fosiva (a) becomes insolvent or ceases to operate as a going concern; (b) files a petition seeking relief or reorganization under any of the bankruptcy laws or insolvency laws; (c) makes a general assignment for the benefit of creditors; or (d) if a receiver, whether temporary or permanent, is appointed for Fosiva's business or property; or
- (5) If Fosiva fails in its maintenance obligations under Section 4.

In the event of a default under paragraph (4) or (5) above, the Village shall also have the right, but not the obligation, to require the conveyance and dedication of the entire Fiber Optic Network installed by Fosiva to the Village.

B. Removal of Hardware upon Termination. Upon the termination of this Agreement by the Village, Fosiva shall, at the Village's request, remove the Hardware and restore the Licensed Premises, at its sole cost and expense, as nearly as practicable to the condition immediately preceding the installation of the Hardware.

9. **Indemnification and Insurance.** Fosiva shall hold harmless, indemnify, and defend the Village, its elected and appointed officials, attorneys, employees, and representatives against any and all losses, expenses, claims, costs, causes, and damages, including without limitation litigation costs and attorneys' fees (i) for any accident, injury, or death to persons or loss or damage to property occurring on or about the Licensed Premises, or any parts thereof, and due in whole or in part to any act and/or omission of Fosiva, its tenants, contractors, representatives, invitees, licensees or employees; or (ii) on account of any failure on the part of Fosiva to perform or comply with any terms or conditions of this Agreement ("Claims"). The provisions of this Section shall not be limited by the amounts of any insurance provided by Fosiva pursuant to this Agreement. Claims that arise prior to the termination of this Agreement shall survive the termination of this Agreement. Noting herein shall be construed as a limitation or waiver of defenses available to the Village and its employees, including, but not limited to, the Illinois Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101, *et seq.*).

Fosiva shall obtain and maintain, at its sole expense, comprehensive general liability insurance in an amount not less than \$2,000,000 to insure against (i) personal injury, death, or property damage occurring on or in connection with the Right-of-Way Fiber, the Hardware, and/or Licensed Premises, (ii) liability assumed under a written contract, and (iii) contractor liability. In addition, all of Fosiva's contractors shall procure and provide evidence of insurance in the amounts and manner set forth in this Section, and as approved by the Village. The Village shall be named as an additional insured on all insurance policies and provided a certificate of insurance to evidence coverage. At the Village's request, Fosiva shall provide copies of all insurance policies required under this Agreement.

10. **Compliance with Law.** Fosiva shall design, construct, and install the Right-of-Way Fiber and the Hardware in compliance with all applicable regulatory and permitting requirements and processes. Fosiva shall at all times be compliant with all applicable laws, statutes, ordinances, codes, rules, regulations and guidelines of any governmental authority having jurisdiction.
11. **Enforcement.** The Parties may, in law or in equity, by suit, action, mandamus or any other proceeding, including, without limitation, specific performance, enforce or compel the performance of this Agreement; provided that Fosiva agrees that it will not seek, and does not have the right to seek, to recover a judgment for monetary damages against the Village or any elected or appointed officials, agents, representatives, attorneys or employees on account of the negotiation, execution, or breach of this Agreement. Fosiva agrees to pay all reasonable costs, attorneys' fees, and expenses incurred by the Village in enforcing this Agreement. Neither party shall be liable for any consequential or indirect damages, or for any claims resulting from lost business opportunity.

12. **Governing Law and Jurisdiction.** This Agreement and any action related to this Agreement will be governed by the laws of the State of Illinois. Any action, hearing, suit, or proceeding arising out of relating to this Agreement must be brought in the state courts of Kane County, Illinois.
13. **Assignment.** Neither party may assign or transfer its rights nor obligations under this Agreement, in whole or part, to a third party without the prior written consent of the other party. An assignment of any rights or obligations shall not relieve the assignor of liability under this Agreement. Any assignment made in violation of this provision shall be null and void.
14. **Binding on Successors and Assigns.** This Agreement will be binding upon and inure to the benefit of, and be enforceable by, the Parties and their respective legal representatives, successors and assigns.
15. **Notices.** All notices and other communications in connection with this Agreement must be in writing and will be deemed delivered to the addressee (a) when delivered in person and receipted for on a business day at the address set forth below; (b) on the fifth business day after being deposited in any main or branch United States post office, for delivery by properly addressed, postage prepaid, certified or registered mail, return receipt requested, at the address listed below; (c) when delivered to the address listed below by any courier service; (d) on the date of transmission, if transmitted by facsimile at the facsimile number listed below and deposited in the U.S. mail on the same day for delivery to the address listed below:

To Fosiva:
Fosiva
340 W. Butterfield Rd., Unit 2D
Elmhurst, IL 60126

with a copy to:
Law Office of Joseph Giralamo
340 W. Butterfield Road, Unit 2D
Elmhurst, Illinois 60126

To the Village:
Village Administrator
Village of Gilberts
87 Galligan Road
Gilberts, IL

with a copy to:
Ancel, Glink, Diamond, Bush DiCianni & Krafthefer, P.C.
140 South Dearborn Street, 6th Floor
Chicago, IL 60603
Attention: Julie A. Tappendorf

16. **Waiver.** A waiver of any provision of this Agreement by a party must be in writing to be effective and will in no way be construed as a waiver of any later breach of that provision. No failure or delay by either party in exercising any option, right, power or privilege under this Agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
17. **Third Party Rights.** No part of this Agreement is intended to create any duties towards, or grant any rights to, any third parties, and no third party shall have any ability to enforce any of the terms and conditions of this Agreement.
18. **Amendment.** This Agreement may be amended only by a writing which is fully and duly executed by the parties hereto.
19. **Entire Agreement.** This Agreement contains the entire agreement between the Parties hereto and supersedes all prior agreements, whether oral or written, with respect to the subject matter hereof. The Parties expressly understand and acknowledge that there are no other oral or written promises, conditions, representations, understandings, warranties or terms of any kind as conditions or inducements to execute this Agreement and none have been relied upon by either Party. The provisions of this Agreement shall be construed as a whole and not strictly for or against any Party.
20. **Authority to Enter Into the Agreement.** Each of the Parties hereto represents and warrants that it has or will have the full right, power, legal capacity and authority to enter into and perform its respective obligations hereunder and that such obligations shall be binding upon such Party without the requirement of the approval or consent of any other person or entity in connection herewith.

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed, effective as of the date first written above.

ATTEST:

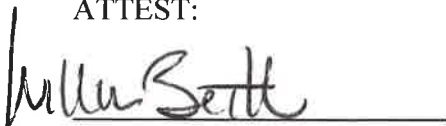


VILLAGE OF GILBERTS

By: 

Its: _____

ATTEST:



IFIBER NETWORKS, LLC, D/B/A FOSIVA



Exhibit A

Map Depicting Existing Fiber Backbone

