**IRU AGREEMENT**

**BETWEEN**

**TOWN A Municipal Light Plant**

**(The Owner)**

**AND**

**TOWN B Municipal Light Plant**

**(The User)**

This AGREEMENT for the indefeasible right to use (or “IRU”) fiber optic facilities (“IRU Agreement”) is made this \_\_ day of \_\_\_\_\_\_\_\_\_\_\_, 2018, by and between \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Municipal Light Plant, a Massachusetts municipal lighting plant, with offices at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, MA (hereinafter "Owner”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Municipal Light Plant, a Massachusetts municipal lighting plant, with offices at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (hereinafter "User”) (individually, a “Party”, together the “Parties”).

**WHEREAS**, The Owner has installed and maintains, or plans to install and maintain certain fiber optic cable within the Owner’s service territory;

**WHEREAS**, the User wishes to use capacity in certain fiber optic cable owned and maintained by Owner; and

**WHEREAS**, the Owner is willing to make a portion of its fiber optic cable capacity available to the User, on the terms and conditions contained herein.

**NOW THEREFORE,** in consideration of the mutual promises and agreements contained herein, the Parties hereby agree as follows:

## DEFINITIONS

* 1. “**Cable**” means fiber optic filaments contained in any suitable jacketing or sheath, installed on poles and in conduit (hereinafter, “Structures”) owned by or jointly owned or licensed and maintained by Owner along the Route (as defined below). For purposes of this IRU Agreement, the Cable may include spliced cable, conduit or customer service drop leading from the Cable to the Owner’s customer's premises. The term “Cable” shall not include optronics or other equipment necessary to light the fiber optic filaments contained therein.
	2. “**Claims**” means any and all liabilities, damages, losses, claims, demands, judgments, costs, and expenses including, without limitation, any claim for personal injuries, property damage, or infringement of patent or trade secret, made by Third Parties.
	3. **Force Majeure Event**” means fire, flood, strike or other labor difficulty, natural disasters, acts of God or public enemy, riot, civil disturbance, restraint or hindrance by any governmental authority, war, insurrection, riot, action of any regulating authorities or institution of litigation by any Third Party, equipment failure, fiber, cable, conduit or other material failures, or any other causes of any nature which are beyond the reasonable control of either Party which could have an adverse effect on the subject matter of this IRU Agreement.
	4. “**Owner’s Territory”** means the geographical areas where Owner (i) owns or operates telecommunications and/or broadband transmission or distribution facilities, and/or (ii) has obtained rights, interests or permissions which would allow the Cable to be installed and operated in such areas.
	5. “**Route”** means that portion of Owner’s Cable on Structures, shown on Exhibit A, to be used by User.
	6. “**Third Party**” means any party, person or entity that is not a signatory to this IRU Agreement or an Affiliate of a Party and any Party, person, or entity that is not a successor or permitted assignee of the Parties hereto.
	7. “**User Fibers**” means the XX fibers in the Cable to which Owner is granting User an indefeasible right of use hereunder.

## IRU GRANT

* 1. This IRU Agreement sets forth the terms and conditions under which the User shall use the User Fibers and the Owner shall maintain and operate the Cable as described in Exhibit A. Pursuant to Article 4 hereof, Owner grants User the indefeasible right to use the User Fibers for any lawful purpose, subject to all the terms and conditions of this IRU Agreement. This IRU Agreement will not convey any form or type of title or possessory interest in any real or personal property in the User Fibers, Structures, Cableor associated equipmentto User. No use of the User Fibers by User or any payment required under this IRU Agreement shall create or vest in User any easement or other ownership or property right in the User Fibers, Structures, Cable or associated equipment of any nature.

## COMMENCMENT DATE AND CONDITIONS PRECEDENT

* 1. The Commencement Date shall be\_\_\_\_\_\_ (i) the date upon which construction and installation of User’s broadband system is completed or (ii) December 31, 20\_\_, whichever occurs sooner, but in no event, later than December 31, 20\_\_, unless otherwise extended in writing by agreement of the Parties.

## TERM

* 1. The IRU granted herein shall commence on the Commencement Date and continue for twenty (20) years (the “Term”), unless terminated earlier in accordance with the provisions hereof.

## FEES

* 1. The User shall pay to the Owner, on or before the Commencement Date, the sum of $\_\_\_\_\_\_\_\_ (the “Fees”) for use of the User Fibers during the Term
	2. No portion of the Fees is refundable should this Agreement be terminated prior to expiration of the Term for any reason, except in the case of breach by Owner that remains uncured as set forth in Section 9.

## EARLY TERMINATION

* 1. This IRU Agreement may be terminated prior to the expiration date provided for in Section 4 above upon any one of the following events:
		1. by either Party following a Breach of this IRU Agreement which remains uncured at the conclusion of the applicable Cure Period by the other Party, as set forth in Section 9 below;
		2. by either Party if the other Party consents to the appointment of, or taking possession by, a receiver, trustee, custodian or liquidator of a substantial part of its assets, files a bankruptcy petition in any bankruptcy court proceeding or answers, consents or seeks relief under any bankruptcy or similar law or fails to obtain a dismissal of an involuntary petition within 60 days of filing; or
		3. (c) Both Parties agree in writing to terminate the IRU Agreement.

## MAINTENANCE AND REPAIR

* 1. The Owner, at its own expense, shall be responsible for the ordinary maintenance and repair of the Cable for the Term, or shall cause such maintenance and repair to be performed by its agent or contractor. The Owner shall have no responsibility for operating, maintaining and repairing any spliced feed from the Cable, or any customer service drop, unless separately contracted by the User to perform such work. For purposes of this IRU Agreement, "ordinary maintenance and repair" shall mean semiannual or annual visual inspection and any pole transfers.
	2. Upon notification by the User of a fault in the User Fibers, the Owner will respond and effect repairs by qualified personnel in a workmanlike manner and in conformity with applicable safety codes and generally prevailing industry standards and the time frame, if any, set forth in Exhibit B. This provision shall apply to any party performing such work, irrespective of whether such personnel are employed by Owner.
	3. The Owner does not guarantee uninterrupted use of the User Fibers, and shall not be liable for any damage or loss suffered by the User as a result of interruptions, including consequential damages, as set forth in Section 10.c.
	4. The Owner shall be responsible for obtaining and maintaining all easements, rights of way, permits, licenses, or other permission for its Structures which are used for the installation of the Cable along the Route or for any modifications or extensions of any of the foregoing. The Owner shall be responsible for obtaining any required approvals by any joint owners of the Structures.

## RELOCATION, REPLACEMENT OF CABLE

* 1. In the event that during the Term of this IRU Agreement the Owner is required by public authorities or by lawful order or decree of a regulatory agency or court to relocate or modify any or all Structures in or on which the Cable or any part thereof is located, the Owner shall provide notice to the User within ten (10) days after the Owner is notified and prior to beginning such relocation. The cost of such work to relocate or modify Structures shall be paid by the Owner and the costs of relocating, modifying or replacing the User’s pro-rata share of the Cable based on the number of User Fibers shall be paid by the User. The Owner shall perform or cause to perform such relocation or modifications of the Structures so as to minimize any interference with the use of the User Fibers.
	2. In the event of an emergency affecting the Structures, the Owner shall be permitted to replace, remove and relocate the Cable or any portion thereof without prior notice, when such notice is not practicable. Notice will be provided at the earliest possible time and the Owner shall not incur any liability for service interruptions in connection with any such removal or relocation. Any such emergency replacement, removal or relocation of the Cable shall be at the sole expense of the Owner.
	3. Should the Cable fail to function according to its design specifications, the Owner shall have no liability to the User for any claims related to such failure. The Owner shall enforce any warranty rights that the Owner may have in the Cable. The User shall have the right, where allowed by law, to recover from any Third Party who may be liable for the Cable failure.
	4. If any portion of the Cable is damaged or destroyed by casualty at any time during the Term of this IRU Agreement, the repairs and/or replacement will be performed in accordance with this Article 7.

## BREACH

* 1. If either Party shall fail to perform (whether any such failure shall arise as the result of the voluntary or involuntary action or inaction, other than that caused by Force Majeure, of such Party), in any material respect, any of its obligations set forth in this IRU Agreement, including without limitation any violation of law (which is material and which adversely affects either Party's obligations under the IRU Agreement) and such failure shall continue uncured for a period of 30 days following written notice from the non‑breaching Party or such shorter period as may apply under law (the "Cure Period"), then such failure shall constitute a "Breach."
	2. In the event of a Breach, the non‑breaching Party may, in its sole discretion, terminate this IRU Agreement as provided in Section 6(i) and have no further obligations or liability hereunder. The non‑breaching Party shall also have the right to pursue any and all rights it may have against the breaching Party now or hereafter under the law, subject to the limitations of Sections 10.c. and 10.d. hereof; including without limitation, the right to seek (i) injunctive relief to prevent the breaching Party from continuing to Breach its obligations under this IRU Agreement, and (ii) reasonable attorney and other expert and Third Party fees of the non‑breaching Party. In addition, the non‑breaching Party shall also have the right to any direct damages incurred as a result of such breach.

## INDEMNIFICATION, LIMITATION OF LIABILITY

* 1. To the extent of its negligence and/or of willful misconduct, each Party shall indemnify and hold harmless the other, and their respective municipalities, along with their respective employees, contractors, subcontractors, agents, commissioners, directors and officers, from and against any and all Claims (including, the cost of defense thereof and attorney's fees) based on the use of the Cable and Structures including, without limitation, any claim for infringement of patent or trade secret made by Third Parties, any claims, whether for personal injury (including death, whether to Owner’s employees, its contractors' or subcontractors' employees, or to the User’s employees, or those of any Third Party) or property damage, relating to the installation, maintenance or operation of the Cable installed or to be installed in or on the Structures, or the conduct or management of each Party's business with regard to the Cable, Structures or the connections thereto.
	2. Each Party shall give prompt notice of any Claim for which indemnification is or will be sought under this Article 10 and shall cooperate and assist in the defense of the Claim. Each Party shall bear its own cost of and have the right to control its own defense and shall have the right to select counsel after consulting with the other Party.
	3. IN NO EVENT SHALL A PARTY BE LIABLE TO THE OTHER PARTY OR TO ITS CUSTOMERS, WHETHER IN CONTRACT, TORT, OR OTHERWISE, INCLUDING STRICT LIABILITY, FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES OR ANY LOST BUSINESS DAMAGES IN THE NATURE OF LOST REVENUES OR PROFITS.

## REPRESENTATIONS AND WARRANTIES

* 1. Owner makes no representations or warranties to User for continuous service. The Parties acknowledge that service interruptions may occur from time to time in which case, Owner will use commercially reasonable efforts to restore service in a prompt manner.
	2. As a material inducement to entering into this IRU Agreement, each Party represents and warrants to the other Party throughout the Term of IRU Agreement hereof that it has all authorizations necessary for it to legally perform its obligations under this IRU Agreement and no consents of any other Party and no act of any other governmental authority is required in connection with the execution, delivery and performance of this IRU Agreement. In addition each Party warrants, with respect to this IRU Agreement, that all acts necessary to the valid execution, delivery and performance of this IRU Agreement, have or will be taken and performed as required under all relevant federal, state and local laws, ordinances or other regulations with which each Party is obligated to comply.
	3. Except as otherwise noted in this IRU Agreement, the Parties agree that the User Fibers are being provided on an “as is,” “as available” basis without warranties of any kind, either express or implied. THE OWNER HEREBY DISCLAIMS ALL OTHER WARRANTIES OR REPRESENTATIONS, BOTH EXPRESS AND IMPLIED, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
	4. No employee or agent of either Party is authorized to make any further or different representations or warranties of any kind, and neither Party may rely on any such unauthorized representations or warranties that have not been expressly adopted by the parties as a written amendment to this IRU Agreement.

## FORCE MAJEURE

* 1. Neither Party shall be liable for any failure of performance due to causes beyond its reasonable control, and without the fault of the Party claiming Force Majeure, including without limitation, any Force Majeure Events, as defined in Section 1.4, provided, however, that no claim of Force Majeure by Owner shall relieve it of its obligation to pay the charges pursuant to Article 7 of this IRU Agreement.
	2. If either Party is rendered wholly or partly unable to perform its obligations under this IRU Agreement because of Force Majeure as defined above, that Party shall be excused from whatever performance is affected by the Force Majeure, to the extent so affected, provided that: (i) the non‑performing Party promptly, but in no case longer than five (5) working days after the occurrence of the Force Majeure, gives the other Party written notice describing the particulars of the occurrence; (ii) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure; and(iii) the non‑performing Party uses reasonable efforts to remedy its inability to perform.

## ASSIGNMENT

* 1. Neither Party shall assign, transfer, delegate or in any other manner dispose of, any of its rights, privileges or obligations under this IRU Agreement without the other Party's written consent, which will not be unreasonably withheld; except a Party may assign this Agreement without consent in connection with a transaction pursuant to which a Party sells all or substantially all of its business, assets or equity interests or merges with another entity, as long as such assignee has the same technical and financial ability as the assigning Party to perform all of the assigning Party’s obligations under this IRU Agreement, such assignee undertakes the legal obligations to perform all of the assigning Party’s obligations under the Agreement, and the assigning Party shall remain liable for all of its obligations under this IRU Agreement, unless the other Party agrees to release such Party.
	2. Either Party shallbe free to mortgage, pledge, or otherwise assign its interests under this IRU Agreement to any Third Party in connection with any borrowing or other financing activity of a Party provided that such assignment shall not limit or otherwise affect a Party's obligations under this IRU Agreement. Any transfer of property of a Party included in or subject to this IRU Agreement may be made by a Party provided the person or entity acquiring such property takes it subject to this IRU Agreement**.**
	3. This IRU Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns where permitted by this IRU Agreement.

## NOTICES

* 1. All notices under this Agreement shall be in writing and will be deemed sufficiently given to the Parties at the address set forth below, unless otherwise advised of a different address, by mail, or by overnight delivery service (with one acknowledged receipt), at the addresses set forth below.

TOWN A:

TOWN A Municipal Light Plant

100 Main Street

TOWN A, Massachusetts 010XX

Attention: General Manager

TOWN B:

TOWN B Municipal Light Plant

100 Main Street

TOWN B, Massachusetts 010XX

Attention: General Manager

## ENTIRE AGREEMENT

* 1. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes any and all previous understandings, oral or written, which pertain thereto.

## MODIFICATION

* 1. No modification to this Agreement shall be valid unless reduced to writing and executed by the authorized representatives of each of the Parties.

## SUCCESSORS AND ASSIGNS

* 1. This Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of each of the Parties hereto.

## MARGINAL HEADINGS, PRONOUNS

* 1. The marginal headings used in this Agreement are for convenience only and shall not be deemed to be a binding portion of this Agreement. The pronouns he, she, or it, are also used for convenience, and in the event that an improper pronoun has been used, it shall be deemed changed so as to render the sentence in which it is contained effective in accordance with its terms.

## GOVERNING LAW AND VENUE

* 1. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts. Venue of any action shall be in a court of appropriate jurisdiction located in the Commonwealth of Massachusetts.

## COUNTERPARTS

* 1. This Agreement may be executed in counterparts, and transmitted electronically or by facsimile. The counterparts taken together shall for one and the same Agreement, and each of which shall be considered an original.

## NO PERSONAL LIABILITY

* 1. No officer, employee, agent, attorney or consultant of either Party shall be charged personally or held contractually liable under any term or provision of this Agreement or because of any breach thereof or because of the execution or attempted execution of this Agreement.

## SEVERABILITY

* 1. If any provision of this instrument is prohibited by law in the Commonwealth of Massachusetts, such provision shall be inef­fective to the extent of such prohibition without invalidating the remaining provisions hereof.

**IN WITNESS WHEREOF**, Town of A Municipal Light Plant and Town B Municipal Light Plant have caused this Agreement to be signed by their respective duly authorized representatives’ effective as of the day and year first above written.

**TOWN A Municipal Light Plant**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

(Name), General Manager

**TOWN B Municipal Light Plant**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

(Name), General Manager

**EXHIBIT “A”**

**User Fiber Route**

**EXHIBIT “B”**

**Repair Schedule**