ORDINANCE NO. 190-17

AN ORDINANCE AUTHORIZING THE MAYOR TO ENTER INTO A MASTER SERVICES AGREEMENT WITH THE MEDINA PORT AUTHORITY FOR FIBER TRANSPORT SERVICES, AND DECLARING AN EMERGENCY.

WHEREAS: Ordinance No. 118-10, Passed August 12, 2010, authorized the Mayor to enter into an Agreement with the County of Medina for participation in the Medina County Port Authority Fiber Network; and

WHEREAS: The Agreement is for the renewal of the Master Services Agreement for a term of 3 years at $500.00/month.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEDINA, OHIO:

SEC. 1: That the Mayor is hereby authorized and directed to enter into a Master Services Agreement with the Medina Port Authority for Fiber transport services.

SEC. 2: That in accordance with Ohio Revised Code §5705.41(D), at the time that the contract or order was made and at the time of execution of the Finance Director's certificate, sufficient funds were available or in the process of collection, to the credit of a proper fund, properly appropriated and free from any previous encumbrance.

SEC. 3: That the funds to cover this agreement, in the amount of $18,000.00 are available in Account No. 001-0070-52212.

SEC. 4: That a copy of the Master Services Agreement is marked Exhibit A, attached hereto and incorporated herein.

SEC. 5: That it is found and determined that all formal actions of this Council concerning and relating to the passage of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with the law.

SEC. 6: That this Ordinance shall be considered an emergency measure necessary for the immediate preservation of the public peace, health and safety, and for the further reason to have in place prior to January 1, 2018; wherefore, this Ordinance shall be in full force and effect immediately upon its passage and signature by the Mayor.

PASSED: __December 11, 2017__   **SIGNED:** __John M. Coyne, III__
                                                President of Council

ATTEST: __Kathy Patton__   **APPROVED:** __December 12, 2017__
               Clerk of Council

                                       SIGNED: __Dennis Hanwell__
                                                   Mayor

MASTER SERVICES AGREEMENT

THIS MASTER SERVICES AGREEMENT is effective when signed by both Parties ("**Effective Date**") by and between **Medina County Port Authority**, an Ohio corporation/company ("MCPA"), whose principal place of business is located at 144 N. Broadway Medina, OH 44256, and is subject to the Ohio open information act, and The City of Medina, an Ohio government ("**Customer**"), whose place of business is located at 132 N. Elmwood, Medina, OH 44256.   Customer and MCPA are referred to herein individually as "**Party**" and collectively as the "**Parties**."

WITNESSETH:

WHEREAS, MCPA owns or operates communications and related facilities and is in the business of providing communications services; and

WHEREAS, Customer wishes to purchase transport services from MCPA, and MCPA wishes to provide transport services to Customer, pursuant to the terms and conditions of this Agreement;

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

1.   DEFINITIONS

The following capitalized terms shall have the following meanings for the purpose of this Agreement. Additional definitions may be found within the attached Exhibit(s):

(a)   "**Acceptance**" or "**Accepted.**" Customer will be deemed to have given its "Acceptance" or to have "Accepted" a Circuit on the earliest date of: (i) when testing pursuant to Exhibit C has been successfully completed and Customer has affirmatively accepted the Circuit in writing, in the manner set forth in Exhibit C; (ii) when Customer puts the Circuit into commercial use; or (iii) five (5) days past the date of the applicable Connection Notice, unless Customer notifies MCPA within such period that the applicable Services do not conform to the Technical Specifications in all material respects.

(b)   "**Access Service Request**" or "ASR" shall mean the written order executed by Customer which delineates the type of Service, quantity of Circuits, Points of Termination, MRCs, NRCs, ASR Term, Start of Service Date and other information necessary for MCPA to provide Service to Customer. An ASR shall be deemed incorporated herein if and when it is agreed to by MCPA's issuance of a FOC as set out in this Agreement.

(c)   "**Affiliate**" of a Party shall mean any person that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with such Party. Person shall mean any individual, partnership, corporation, company, limited liability company, association, or any other legal entity authorized to transact business in any state in the United States.

(d)   "**Agreement**" shall mean this Master Service Agreement, including any schedules, appendices, Exhibits and documents such as accepted ASRs attached hereto and made a part hereof, or incorporated herein by reference as well as any written amendments to this Agreement which have been signed by the duly authorized representatives of the Parties.

(e)   "**ASR Term**" shall mean the minimum period of time specified in an ASR for which Customer commits to purchase and MCPA commits to supply the Service specified in the ASR.

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(f)   **"Circuit"** shall mean a transport service between an originating and terminating location with a defined bandwidth and class of service.

(g)   **"Confidential Information"** shall have the definition set forth in Section 9.

(h)   **"Connection Notice"** shall have the definition set forth in Exhibit C.

(i)   **"Customer Reseller"** shall have the definition set forth in Section 12.1.

(j)   **"Default"** shall have the definition as set forth in Section 8.

(k)   **"Design Layout Record"** or **"DLR"** means a document containing technical information which specifies MCPA's circuit identification and appropriate interconnection information.

(l)   **"Emergency Maintenance"** shall mean maintenance which, if not accomplished promptly by MCPA, could result in a serious degradation or loss of Service to Customer.

(m)   **"End User"** means an end user of Customer whose traffic Customer will carry via the Service.

(n)   **"Firm Order Confirmation"** or **"FOC"** shall mean an order confirmation document in which MCPA commits to the Start of Service Date or other date agreed upon by the Parties and other terms of the ASR.

(o)   **"Firm Order Confirmation/FOC Date"** shall mean the date that has been identified as the installation date in the FOC.

(p)   **"Market"** shall mean the MCPA geographic service area as set forth in the applicable ASR.

(q)   **"Monthly Recurring Charges"** or **"MRC"** shall mean a charge for Services to be invoiced and paid on a monthly basis.

(r)   **"Network"** shall mean the communications network of one of the Parties, as the context of the provision requires or as contemplated under this Agreement.

(s)   **"Non-Recurring Charges"** or **"NRC"** shall mean a charge for Services to be invoiced and paid on a one-time basis.

(t)   **"Planned Service Outage"** shall mean any Service Outage caused by scheduled maintenance or planned enhancements or upgrades to MCPA's Network and either (i) agreed to in writing by Customer's operations group via e-mail or other means, such agreement not to be unreasonably withheld, provided the scheduled maintenance or planned enhancements or upgrades are performed within the hours of 12:00 midnight and 6:00 AM local time, unless otherwise agreed by the Parties, or (ii) in the case of Emergency Maintenance, MCPA's operations group provides as much prior notice as practicable, via e-mail or other means.

(u)   **"Point of Termination"** shall mean the particular location within the applicable Customer Mobile Switching Center ("MSC") or other Site within the Market to be served, as specified in the applicable ASR, where MCPA's responsibility to provide MCPA Equipment and Service ends and where Customer's Network and Customer's responsibilities begin.

(v)   **"Service(s)"** shall mean transport service(s) provided by MCPA under this Agreement.

(w)   **"Service Commencement Date"** shall mean the date upon which a Circuit is Accepted.

(x)   **"Service Outage"** shall have the definition set forth in Section 15.4.

(y)   **"Site"** shall mean the premises of Customer or an End User at which a Point of Termination is located.

(z)   **"Start of Service Date"** for a particular Service, shall be the date requested by Customer for in-service as indicated on the ASR.

(aa)   **"Technical Specifications"** shall mean the performance specifications for each Service, which are set forth in the attached Exhibit A, as amended by MCPA from time to time upon thirty (30) days written notice to Customer.

(bb)   **"Term"** shall have the definition set forth in Section 5.

(cc)   **"Trouble Ticket"** shall have the definition set forth in Section 15.2.

(dd)   **"MCPA Equipment"** shall have the definition set forth in Section 16.1.

2. ORDERING, PROVISION AND USE OF SERVICES

2.1   ASRs. Customer may from time to time throughout the Term place orders for specific Services by the execution and delivery to MCPA of an ASR in the form attached as Exhibit D to this Agreement. MCPA shall use commercially reasonable efforts to notify Customer in writing of its acceptance or rejection of the ASR within one (1) business day. If MCPA desires to provide the Services requested in the ASR, MCPA will issue to Customer a FOC referencing the applicable ASR within (2) two business days after ASR acceptance by MCPA. Each ASR will be effective and binding on the Parties only upon issuance of the FOC, and will become part of this Agreement only to the extent that it specifies the type of Services, quantity of Circuits, Points of Termination, MRCs, NRCs, Start of Service Date (provided it is the same date as the FOC Date), ASR Term, and other information necessary to MCPA to provide Services. Any terms and conditions that are typed, printed or otherwise included in any ASR that conflict or are inconsistent with the terms of this Agreement will have no force or effect. The parties agree that Customer may submit ASRs to MCPA via e-mail, facsimile, an Internet-based system established by MCPA, or by any other electronic system as agreed to between the Parties.

2.2   Design Layout Record. At Customer's request, MCPA will provide Customer with a DLR no less than five (5) days prior to MCPA's scheduled testing date.

2.3   Provision of Services. Subject to the terms and conditions of this Agreement, MCPA shall, directly or through one or more of its Affiliates, provide Customer the Services pursuant to written ASRs accepted in accordance with the terms and conditions of this Section 2. Notwithstanding the provision of Services through one or more of its Affiliates, MCPA shall in all instances remain fully financially responsible for such Services hereunder as if MCPA were providing the Services itself.

2.4   Use of Services. Both Parties, including Customer's use of the Service (including all content transmitted via the Service), shall comply with all applicable laws and regulations and the terms of this Agreement in connection with the performance of their respective obligations hereunder. Customer shall not use, or permit the use of the Service, in a manner that will impair MCPA's network or facilities or the ability of other MCPA

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customers to use MCPA's services. As between the Parties, Customer is solely responsible for (a) all use (whether or not authorized) of the Service, which use shall be deemed Customer's use for purposes of this Agreement; and (b) all content that is stored or transmitted via the Service. Customer will provide MCPA reasonable advance written notice of any order for Service to be provided to a governmental entity. The Parties acknowledge and agree that unless otherwise expressly agreed in writing by an authorized representative of MCPA, MCPA will not be bound by any flow-down clause imposed by a governmental entity.

3. BILLING AND PAYMENT

3.1 <u>MRCs and NRCs</u>. The MRCs and any applicable NRCs payable by Customer for each Service shall be set forth in another document agreed upon by the Parties (e.g., an ASR) and shall be paid after being invoiced as provided below. Customer agrees to pay any charges for the Services that are not disputed in good faith in accordance with <u>Section 3.4</u> within thirty (30) days after the date of the invoice (the "**Due Date**") in immediately available funds, ACH or via company check to the address set forth in <u>Section 17</u>. MCPA shall provide Customer with reasonably requested information for bill validation including, but not limited to, the number of Circuits, any applicable Service codes, and charges for each Service.

3.2 <u>Commencement of Billing</u>. As compensation for the Services provided by MCPA, Customer shall pay the MRCs and all applicable NRCs, beginning on the Service Commencement Date. Notwithstanding the foregoing, in the event of a delay in activation of Service under an ASR is due to material delays or failures by Customer, a Customer Reseller or an End User, MCPA shall be permitted to commence billing on the FOC Date for the applicable Service provided that MCPA is able to perform / to deliver such Service in all material respects.

3.3 <u>Interest</u>. Unpaid amounts that are not disputed in good faith in accordance with <u>Section 3.4</u> are subject to interest, not to exceed 1.5% monthly, charged by MCPA on the balance not paid by the Due Date, calculated on a daily basis from the first day when said amount became due and owing until paid. If the interest rate exceeds the maximum rate allowable by law, then the interest rate shall be equal to the maximum rate allowed by law. Customer shall also be responsible for all costs of collection (including reasonable attorneys' fees) to collect undisputed overdue amounts.

3.4 <u>Billing Disputes</u>. In the event Customer disputes any billing by MCPA, Customer shall notify MCPA in writing with an explanation for the dispute, and shall nevertheless pay all charges not disputed in good faith by the Due Date. The Parties will cooperate in good faith to resolve any such disputes within a sixty (60) day period after the dispute is submitted to MCPA. If the dispute is subsequently resolved in favor of MCPA, MCPA shall re-invoice the disputed amount owed then from the original due date, together with any applicable interest calculated in accordance with <u>Section 3.3</u> above, and Customer shall pay all such amounts within thirty (30) days after the date of the reissued invoice.

3.5 <u>Payment of Credits</u>. In the event of a Service Outage, then at Customer's request and subject to the provisions of the Exhibit B, MCPA will credit Customer for the affected Service for the Service Outage as set forth in <u>Exhibit B</u>.

3.6 When Service is initiated on a day other than the first of the month or terminates on a day other than the last of the month, the MRCs shall be determined by prorating the monthly payment for the number of days during such month that Service was provided.

3.7   Customer shall not be liable for any amounts that were not previously billed to Customer by MCPA and as to which over ninety (90) days have passed since the applicable Service(s) was provided unless MCPA has notified Customer that it is unable to bill for such Services within thirty (30) days of the billing period in which Services were provided.

4. TAXES

4.1   Generally. Customer shall pay any applicable federal, state or local sales, use, or excise taxes, fees or surcharges in connection with the Service furnished to Customer pursuant hereto, including state or federal Universal Service Fund contributions, but excluding any taxes based upon MCPA's property, net income, franchise, license, or capital stock, or taxes and penalties imposed on MCPA due to its failure to pay amounts when due, and taxes on MCPA Equipment. Customer shall pay all gross receipts taxes which may be passed through by MCPA under the rules of any Federal, state or local governmental authority. Notwithstanding the foregoing, Customer shall not be liable for any gross receipts taxes enacted or imposed in lieu of state or local income or franchise taxes. MCPA shall have the right to recover from Customer the amount of any fees or taxes imposed directly on MCPA in connection with the Services provided hereunder in accordance with all applicable laws, in the form of a surcharge included on MCPA's invoice.

4.2   Exemption Documentation. Customer shall provide MCPA with information, including but not limited to duly executed exemption certificates with respect to any exemption from sales, use or other tax or fee exemption claimed by Customer and shall immediately notify MCPA of any change in Customer's tax status. To the extent any such exemption documentation is held invalid by the tax or governmental authority for any reason, Customer agrees to reimburse MCPA for any tax liability including without limitation related interest and penalties arising from such invalid documentation.

4.3   Protest. Customer and MCPA shall each have the right to protest or appeal any tax or charge assessed against it by any taxing authority. However, the appealing party shall bear all costs and expenses associated with such appeal. Any liability related to taxes, fees, penalties, and interest arising in connection with a charge or assessment by any taxing authority shall be allocated to the Parties in accordance with this Section 4.

5. TERM AND RENEWAL OPTIONS

5.1   Term of Agreement. The term of this Agreement ("**Term**") shall commence on January 1, 2018 and shall terminate three (3) years thereafter, unless earlier terminated as provided herein. This Agreement shall continue thereafter unless terminated by written notice by one of the Parties giving at least one hundred eighty (180) days prior written notice to the other Party. Notwithstanding the foregoing, in the event the period of time for a particular Service or Services to be provided by MCPA to Customer pursuant to the applicable ASR(s) extends beyond the expiration or other termination of this Agreement, the Term shall automatically be deemed extended for the duration of the provision of that Service, subject to specific Service termination provisions set forth herein.

5.2   ASR Term. The ASR Term will be specified in the applicable ASR, and will commence on the Service Commencement Date. Upon expiration of the ASR Term with respect to a particular ASR, the ASR Term shall continue on a month to month basis until terminated by (a) Customer upon thirty (30) days written notice to MCPA or (b) MCPA upon ninety (90) days written notice to Customer.

5.3   Early Termination.

(a)   Except as may be agreed upon in a mutually agreed upon document (e.g., ASR), in the event that Customer terminates a Circuit at any time after issuance of the FOC Date by MCPA and prior to the applicable Service Commencement Date, Customer shall pay MCPA on demand the cost of any third party-imposed termination liability incurred as a result of such termination, as well as any documented construction expenses or installation charges incurred by MCPA prior to such termination.

(b)   Except as may be agreed upon in a mutually agreed upon document (e.g., ASR) or as set forth in Section 5.4 or in the event Customer terminates a Service pursuant to Section 8.2 herein, in the event that Customer terminates a Circuit on or after the Service Commencement Date but before the end of the applicable ASR Term, Customer shall pay to MCPA on demand, as liquidated damages and not as a penalty, an early termination charge equal to the sum of: (1) the full amount of all undisputed past due charges and interest thereon, if any, and (2) one hundred percent (100%) of all remaining MRCs for the first year of the applicable ASR Term, twenty percent (20%) of all remaining MRCs for any subsequent years of the applicable ASR Term.

5.4   Portability. Customer may, upon written Notice to MCPA, discontinue or terminate Service at a Site, prior to the end of the applicable ASR Term, without payment of the applicable termination charge, if Customer (a) replaces the affected Circuit with a different Circuit located within the same MCPA Market and places an ASR for such replacement Circuit having a Start of Service Date no later than ninety (90) days after discontinuance or termination of the original Circuit, so long as the replacement Circuit has a value (determined by multiplying the MRC for such replacement Circuit and ASR Term for such replacement Circuit) equal to or greater than the original Circuit (such value determined by multiplying the number of months remaining in the original Circuit's remaining ASR Term by such Circuit's MRC), and (b) pays to MCPA on demand all documented construction expenses and other non-recurring charges, if any, associated with the replacement Circuit, and the costs and expenses incurred by MCPA to terminate the terminated Circuit, including without limitation any applicable third-party termination liability.

6. INSURANCE

6.1   MCPA Obligations. MCPA shall, at its own expense, obtain and keep in full force and effect at all times for the duration of this Agreement, on an occurrence basis with a carrier or carriers having a Best Rating Service rating of A- / X or better and licensed to do business in the State where the Services are to be delivered, insurance policies of the following kinds and in the following amounts, with Customer to be named as an additional insured as its interest may appear:

(a)   Workers' Compensation Insurance in accordance with all applicable laws and regulations applicable to the employees who are engaged in the performance of this Agreement;

(b)   Employer's liability insurance with limits for employer's liability of $500,000 per accident/occurrence;

(c)   Commercial general liability insurance, covering comprehensive bodily injury and property damage liability insurance, including automobile insurance, contractual liability insurance, and claims for bodily injury, death and property damage, including comprehensive form, premises and operations, independent contractors, products and completed operations, personal injury, and broad form property damage liability coverage, in at least the following amounts:

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Bodily injury to any one person	$1,000,000
Bodily injury aggregate	$1,000,000
Property damage in any one accident	$2,000,000
Property damage aggregate	$2,000,000.

Umbrella, or excess liability, coverage in the amount of $5,000,000.

Upon request of Customer, MCPA shall furnish Customer certificates of such insurance, and each policy shall make commercially reasonable efforts to provide that no decrease, non-renewal, or cancellation shall become effective except upon thirty (30) days' prior notice to Customer of such decrease non-renewal, or cancellation. MCPA shall obtain a waiver of rights of subrogation for commercial general liability insurance from its insurer in favor of Customer.

6.2 <u>Customer's Obligations</u>. Customer shall carry such types and amounts of insurance as are reasonably necessary to meet Customer's obligations under this Agreement. Upon request of MCPA, Customer will furnish to MCPA certificates of such insurance.

7. **WARRANTIES AND NETWORK STANDARDS FOR SERVICES**

7.1 <u>Representations of the Parties</u>. Each Party hereby represents and warrants to the other Party that such Party has been duly formed and is in good standing in the state of its organization, that such Party is qualified to do business in the states where the Services will be delivered, and that the execution of this Agreement by such Party has been duly authorized in compliance with such Party's organization documents and procedures.

7.2 <u>DISCLAIMER</u>. THE SERVICES AND RELATED EQUIPMENT AND/OR OTHER MATERIALS USED IN CONNECTION WITH THE SERVICES, IF ANY, ARE PROVIDED WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NO ADVICE OR INFORMATION GIVEN BY MCPA, ITS AFFILIATES OR ITS CONTRACTORS OR THEIR RESPECTIVE EMPLOYEES SHALL CREATE ANY WARRANTY. EXCEPT AS SET FORTH IN EXHIBIT B, MCPA DOES NOT REPRESENT OR WARRANT THAT THE SERVICE WILL MEET CUSTOMER'S REQUIREMENTS, WILL PREVENT UNAUTHORIZED ACCESS BY THIRD PARTIES, WILL BE UNINTERRUPTED, SECURE, ERROR-FREE, WITHOUT DEGRADATION OF VOICE QUALITY OR LOSS OF CONTENT, DATA OR INFORMATION OR THAT ANY MINIMUM TRANSMISSION SPEED IS GUARANTEED AT ANY TIME. CUSTOMER FURTHER ACKNOWLEDGES AND AGREES THAT ANY DATA, MATERIAL OR TRAFFIC OF ANY KIND WHATSOEVER CARRIED, UPLOADED, DOWNLOADED OR OTHERWISE OBTAINED THROUGH THE USE OF THE SERVICE IS DONE AT CUSTOMER'S OWN DISCRETION AND RISK. ANY SERVICES PROVIDED BY CUSTOMER TO ANY THIRD PARTIES (INCLUDING ANY CUSTOMER OF CUSTOMER, CUSTOMER RESELLER OR END USER) ARE THE SOLE RESPONSIBILITY OF CUSTOMER, AND IN NO CIRCUMSTANCES SHALL SUCH SERVICES BE DEEMED TO BE SERVICES PROVIDED BY MCPA TO SUCH PARTIES. THE DISCLAIMER OF WARRANTY SET FORTH IN THIS <u>SECTION 7.2</u> SHALL NOT AFFECT CUSTOMER'S RIGHTS OTHERWISE SPECIFICALLY SET FORTH IN THIS AGREEMENT.

8. **DEFAULT**

8.1. A Party shall be deemed in default of this Agreement (a "**Default**") upon the occurrence of any one or more of the following events:

(a)   If a Party liquidates, is adjudicated as bankrupt, makes an assignment for the benefit of creditors, invokes any provision of law for general relief from its creditors or initiates any proceeding seeking general protection from its creditors;

(b)   Except with respect to payment defaults, a Party fails to perform its material obligations under this Agreement and such nonperformance is not remedied within thirty (30) days after receipt of written notice thereof, provided that if the breach is of such a nature that it cannot be cured within thirty (30) days, then such Party shall not be in Default so long as it commences to cure within such period of time and thereafter diligently and continuously pursues such cure to completion; or

(c)   A Party fails to make any payment under this Agreement when due and such failure is not remedied within ten (10) business days after receipt of written notice thereof.

8.2   Upon the occurrence of a Default and subject to the applicable notice and cure periods, the non-defaulting Party hereunder may, without liability to the other Party, terminate the applicable Services affected by such uncured Default, or suspend performance with respect to the applicable Service under the affected ASRs. The foregoing shall be in addition to any other rights and remedies that either Party may have under this Agreement or at law or equity relating to the other Party's material breach.

9. CONFIDENTIAL INFORMATION

No Party or any of its Affiliates (the "**Receiving Party**"), without the prior written consent in each instance of the other Party (the "**Disclosing Party**"), shall disclose to any third party any confidential information supplied to the Receiving Party by the Disclosing Party or any Affiliates of the Disclosing Party which has been designated as CONFIDENTIAL or PROPRIETARY or PRIVATE and which is not otherwise generally available to the public, has not been independently developed by the Receiving Party, and has not previously been known by or disclosed to the Receiving Party by a third party not bound by confidentiality restrictions or other binding contractual duty not to disclose such information (collectively, "**Confidential Information**"). The terms and conditions of this Agreement, as well as pricing information exchanged in connection with this Agreement, or included in any Service hereunder, and all non-public information of either Party or its Affiliates which was disclosed to the other Party in connection with the discussions leading up to the execution of this Agreement, are hereby designated as Confidential Information without further obligation on the part of either Party to mark or designate it as such. The Receiving Party shall not use any Confidential Information of the Disclosing Party or its Affiliates for any purpose other than the performance of its obligations under this Agreement, nor permit any of its employees, affiliates, or representatives to disclose such Confidential Information to any third person, and it shall disclose Confidential Information only to those of its employees, affiliates, and representatives who have a need for it in connection with the use or provision of Services or other obligations required to comply with this Agreement. Each Party shall protect the Confidential Information of the Disclosing Party or its Affiliates from both unauthorized use and unauthorized disclosure. Upon cessation of Services, or upon written request, each Party shall return or destroy all Confidential Information of the other. Prior to disclosing Confidential Information to its employees, Affiliates, and/or representatives, the Receiving Party shall notify such employees, Affiliates, and representatives of their obligation to comply with this Section 9. If a Receiving Party is required by any governmental authority or by applicable law to disclose any Confidential Information, then such Receiving Party may disclose such Confidential Information, provided that the Receiving Party shall provide the Disclosing Party with written notice of such requirement as soon as possible and, unless required by law, prior to such disclosure. Upon receipt of written notice of the requirement to disclose Confidential Information, the Disclosing Party, at its expense, may then either seek appropriate protective relief in advance of such requirement to prevent all or part of such disclosure or waive the Receiving Party's compliance with the requirements of this Section 9 with respect to all or part of such Confidential Information. The Parties hereby designate the terms, conditions, exhibits and schedules of this Agreement to be Confidential Information. Unless required by applicable law, no Party without the written consent of the other Party, shall provide a copy of this Agreement in whole or in part to any third

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person or entity not employed or retained by MCPA or Customer. The provisions of this Section 9 shall survive for a period of five (5) years following the date of initial disclosure of that Confidential Information or five (5) years beyond termination or expiration of this Agreement, whichever is greater.

10. LIMITATION OF LIABILITY; INDEMNIFICATION

10.1 NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, RELIANCE, OR PUNITIVE DAMAGES (INCLUDING BUT NOT LIMITED TO ANY LOST PROFITS, LOST REVENUES, LOST SAVINGS, OR HARM TO BUSINESS) ARISING OUT OF OR RELATING TO THE SERVICES OR EITHER PARTY'S PERFORMANCE OR NONPERFORMANCE UNDER THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10.2 EXCEPT TO THE EXTENT OF A CUSTOMER'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT, THE AGGREGATE LIABILITY OF EITHER PARTY FOR ANY REASON AND ALL CAUSES OF ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT SHALL BE LIMITED TO THE TOTAL FEES PAID OR PAYABLE BY CUSTOMER UNDER THE APPLICABLE ASR FOR THE APPLICABLE SERVICE DURING THE SIX (6) MONTHS PRECEDING THE CLAIM.

10.3 NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, MCPA'S SOLE LIABILITY, AND CUSTOMER'S SOLE REMEDY, WITH RESPECT TO ANY FAILURE OF THE SERVICE SHALL BE AS SET FORTH IN THE SERVICE LEVEL AGREEMENT ATTACHED HERETO AS EXHIBIT B.

Neither Party shall be required to indemnify or hold the other Party harmless against liabilities arising from the Agreement. However, as between MCPA and Customer, to the extent permitted by law, each such Party shall bear the risk of loss for, shall pay directly, and shall defend against any and all claims, liabilities, proceedings, actions, expenses, damages or losses arising under or related to the negligence or willful default of that Party and its employees, except that neither Party shall bear the risk of loss of, nor pay for, any claims, liabilities, proceedings, actions, expenses, damages or losses that arise directly from events occurring after termination of the Agreement in accordance with the terms of the Agreement or that arise in any respect, directly or indirectly, in whole or in part, from the negligence or willful misconduct of the other Party or of any of its employees, contractors or agents.

11. REGULATORY

In the event that a decision by a communications regulatory authority or court with competent jurisdiction at the federal, state or local level ("**Decision**") has the effect of canceling, changing, superseding or frustrating any material term or provision of this Agreement or otherwise materially changing the economic structure of the transactions contemplated hereunder, then Customer acknowledges and agrees that MCPA may pass through to Customer any such increased costs unless Customer establishes an exemption from such cost, and the Parties will negotiate in good faith to amend this Agreement in light of such Decision in a manner consistent with the form, intent and purpose of this Agreement and the economic structure of the transactions contemplated hereunder and as necessary to comply with such rule, regulation, law or order. If the Parties fail to mutually agree upon such amendments and the Decision imposes material harm to a Party under this Agreement, including but not limited to required changes in the Service charges, the harmed Party shall have the right to terminate the Agreement without penalty or continuing obligation within a period of thirty (30) days from the date of effectiveness of the final non-appealable Decision.

12 FORCE MAJEURE

12.1   In no event shall a Party have any claim or right against the other Party for any failure of performance by such other Party if such failure of performance is caused by or the result of, in whole or in part, (i) causes beyond the reasonable control of such other Party, including, but not limited to, acts of God, fire, lightning, storm, flood, or other natural disaster; (ii) laws, orders, rules, regulations, directions, or actions of governmental authorities having jurisdiction over this Agreement; or (iii) any civil or military action including national emergencies, riots, war, terrorism and civil insurrections ("**Force Majeure**"). The Party whose performance is affected shall use commercially reasonable efforts to minimize the impact of such Force Majeure event. A Force Majeure event shall never excuse the failure to make a payment due hereunder, except to the extent that the Force Majeure event physically interferes with the delivery of the payment.

12.2   If failure of performance by a Party hereunder due to Force Majeure events is for thirty (30) days or less, this Agreement and all ASRs issued hereunder then in effect shall remain in effect. If the Force Majeure event continues beyond thirty (30) days, thereafter upon ten (10) days written notice to the other Party, either Party may terminate only the affected Service(s) or Circuit(s), without incurring any penalty or further obligation to the other Party (including cancellation or termination charges).

12.3   If either Party asserts the applicability of this Section 13, it shall use commercially reasonable efforts to provide prompt Notice to the other Party of the commencement and ending of the Force Majeure event.

13. ASSIGNABILITY

No Party may assign this Agreement without the prior written consent of the other Party, such consent not to be unreasonably withheld, and then only when such transfer or assignment can be accomplished without interruption of the use or location of Service. Notwithstanding the foregoing and with written notice to the other Party, either Party may assign this Agreement to an Affiliate or to any entity acquiring all or substantially all of the assets or equity of the assigning Party; provided, however that in each instance that the assignee is financially capable of meeting the assigning Party's obligations under this Agreement. In addition, MCPA shall have the right to engage one or more subcontractors in connection with its performance hereunder. All the terms and provisions of this Agreement will be binding upon, will inure to the benefit of and will be enforceable by the Parties and their respective successors and permitted assigns.

14. TROUBLE TICKET PROCEDURE FOR SERVICE OUTAGE

14.1   MCPA will maintain a point-of-contact for Customer's designated personnel, as mutually agreed upon by the Parties, to report a Service Outage to MCPA twenty-four (24) hours a day, seven (7) days a week, including U.S. National holidays. All customer support shall be provided to Customer's designated personnel only. Customer is solely responsible for interfacing with its employees, Customer Resellers and End Users.

14.2   For purposes of this Agreement, a "**Service Outage**" will mean an unavailability of the Service to carry traffic between two Points of Termination; provided that a Service Outage will not be deemed to have occurred in the event that it arises from or relates to any of the following: (i) a Circuit has not been "Accepted" by Customer; (ii) the negligence, error, acts or omissions of Customer or others authorized by Customer to use the Service; (iii) failure of Customer provided equipment; (iv) during any period in which MCPA or its agents are not afforded access to the premises under Customer's control where the access lines associated with the Service are terminated; (v)   during any period when Customer has released Service to MCPA for maintenance or rearrangement purpose (including, without limitation, during any Planned Service Outage); (vi) any period when Customer elects not to release the Service(s) for testing and/or repair and continues to use it on an impaired basis; (vii) a Force Majeure event; (viii) a breach by Customer of its obligations under this Agreement.

14.3   In the event MCPA dispatches a field technician to a Site to perform diagnostic troubleshooting and the problem resides with Customer's equipment or facilities or results in a "No Trouble Found," or the failure is due to Customer acts or omissions, then Customer will pay MCPA for time and materials at MCPA's standard technician rates.

15. BUILDING AND EQUIPMENT ACCESS

15.1.   Site Access. Customer shall allow MCPA reasonable, escorted access to the Customer Site or any End User Site to install, operate, maintain, repair and replace (collectively "**Work**") fiber optic cable, co-axial cable, copper wiring, antennas, and any other transmission medium and associated equipment (collectively, the "**MCPA Equipment**") in and on the Customer Site or End User Site for purposes of providing Services under this Agreement. MCPA shall use commercially reasonable efforts to give prior written notice to Customer of its intent to enter the Customer Site or End User Site. Customer shall obtain all rights of way, public and private easements, licenses and consents with respect the performance of Work at any Customer Site or End User Site.

15.2   Space and Power. Customer shall, upon MCPA's request and at no cost to MCPA, (i) provide adequate clean electrical power to meet MCPA's reasonable requirements, during the term of the applicable ASR, at the Site(s) specified in the applicable ASR, as well as all necessary connections to electrical and mechanical facilities at the Customer Site or End User Site as are necessary for the operation of MCPA Equipment in the Customer Site or End User Site; and (ii) provide floor space, an equipment bay or equipment rack space at the Customer Site or End User Site which will include, without limitation, environment (humidity control, fire suppression, temperature/climate control, security control and alarm monitoring), redundant/DC power and, if available, protected/UPS AC power, technical and maintenance support, site access, cable entrance, conduit, COC access, tower/antenna space, ground isolation device and central office repeater.

15.3   Ownership of MCPA Equipment. The MCPA Equipment, and any and all other equipment used to provide the Services, shall remain the exclusive property of MCPA. Customer shall ensure that the MCPA Equipment at any Customer Site or End User Site remains free from all liens and encumbrances and Customer shall be responsible for loss or damage to the MCPA Equipment while at the Customer Site or End User Site. Customer agrees to conform its equipment and software, and to ensure that each End User conforms its equipment and software, to the technical specifications provided by MCPA from time to time. Customer shall not, and shall ensure that its End Users and Customer Resellers shall not, tamper with, remove or conceal any identifying plates, tags or labels affixed to such equipment, nor align, or attempt to repair, MCPA's equipment except as expressly authorized in advance in writing by MCPA. Unless otherwise agreed in writing by the Parties, interconnection of

the MCPA Equipment with Customer's, the Customer Reseller's or the End User's equipment will be performed by Customer. MCPA Equipment shall not be removed or relocated by Customer, a Customer Reseller or any End User. MCPA shall have the right, but not the obligation, to upgrade, modify and enhance the MCPA Equipment (including related firmware) and the Service and take any action that MCPA deems appropriate to protect the Service and its facilities.

16.   NOTICES

16.1   All notices, demands, requests, or other communications under this Agreement shall be in writing and delivered by hand delivery (including overnight mail delivery service or courier), postage prepaid, or mailed by first-class registered or certified mail, return receipt requested, postage prepaid, to the persons whose names and business addresses appear below and such notice shall be effective on the date of receipt by the receiving Party:

If to MCPA:	Ron Paydo 144 N. Broadway Medina, OH 44256
with a copy to:	David Corrado *144 N. Broadway* *Medina, OH 44256*
If to Customer*:*	*Darin Zaremba* *132 N. Elmwood* *Medina, OH 44256*
with a copy to:	*Mayor Dennis Hanwell* *132 N. Elmwood* *Medina, OH 44256*

16.2   Each Party may designate by notice in writing a new person and/or address to which any notice, demand, request or communication may thereafter be so given, served or sent. Each notice, demand, request, or communication which shall be mailed, delivered or transmitted in the manner described above shall be deemed sufficiently given, served, sent and received for all purposes at such time as it is delivered to the addressee (with the return receipt, the delivery receipt, the affidavit of messenger or facsimile transmission confirmation being deemed conclusive, but not exclusive evidence of such delivery) or at such time as delivery is refused by the address upon presentation.

17. MISCELLANEOUS

17.1   Entire Agreement. This Agreement sets forth the entire understanding of the Parties and supersedes all prior agreements, interim agreements, letters of agreement, memorandums of understanding, and any other oral or written documentation of agreements between the Parties hereto with respect to the subject matter hereof. In the event of any inconsistency between the main body of this Agreement and any appendices, Exhibits, or orders made a part or in accordance with this Agreement, precedence shall be given in the following order to:

1.   The main body of this Agreement;

2.   Appendices and Exhibits hereto; and

3.   Any ASR executed pursuant to this Agreement.

17.2   Legal Relationship. Nothing in this Agreement shall be deemed to create any relationship between MCPA and Customer other than that of independent parties contracting with each other solely for the purpose of carrying out the provisions of this Agreement. This Agreement does not render either Party the employee, agent or legal representative of the other Party and does not create a partnership or joint venture between Customer and MCPA. Neither Party shall have any authority to enter into any agreement on behalf of or bind the other Party in any manner whatsoever without the prior written consent of the other Party. This Agreement confers no rights of any kind upon any third party, except as specifically set forth herein.

17.3   Compliance with Laws. In connection with the matters provided for in this Agreement, each Party hereto shall comply with all applicable laws and regulations, including, but not limited to, the Telecommunications Act of 1996, as may be amended, and the policies, rules and regulations of the Federal Communications Commission, and all applicable local and state rules and regulations. Customer's use of the Service (including all content transmitted via the Service) shall comply with all applicable laws and regulations and the terms of this Agreement. This Agreement, its exhibits, and the ASR(s) are subject to all applicable federal, state or local laws and regulations in effect in the relevant jurisdiction(s) in which MCPA provides the Services. If any provision of this Agreement, its exhibits, or the ASR(s) contravene or are in conflict with any such law or regulation, then the terms of such law or regulation shall take priority over the relevant provision of this Agreement, its exhibits, and/or the ASR(s). If the relevant law or regulation applies to some but not all of the Service(s) being provided hereunder, then such law or regulation will take priority over the relevant provision of this Agreement, its exhibits, and the ASR(s) only for purposes of those Service(s) to which the law or regulation applies. Except as explicitly stated in this Agreement, nothing contained in this Agreement shall constitute a waiver by either Party of any rights under applicable laws or regulations pertaining to the installation, operation, maintenance or removal of the Services, facilities or equipment.

17.4   Waiver. No waiver of any of the provisions of this Agreement shall be binding unless it is in writing and signed by both Parties. The waiver by any Party hereto of a breach or a default under any of the provisions of this Agreement, or the failure of either Party on one or more occasions to insist on the strict enforcement of any provision of this Agreement or to exercise any right or privilege hereunder shall not constitute or be construed as a waiver of any subsequent breach or default of a similar nature, or any provision, rights or privileges, and all such terms shall remain in full force and effect.

17.5   Amendments. No subsequent agreement between the Parties concerning the Service (including, without limitation, any amendment to this Agreement or any ASR) shall be effective or binding unless it is agreed to in writing by authorized representatives of the Parties.

17.6   Severability. If any part of any provision of this Agreement or any other agreement, document or writing given pursuant to or in connection with this Agreement shall be invalid or unenforceable under

applicable law, said part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of said provision or the remaining provisions of this Agreement.

17.7 <u>Interpretation</u>. Section and subsection headings contained in this Agreement are inserted for convenience of reference only, shall not be deemed to be a part of this Agreement for any purpose, and shall not in any way define or affect the meaning, construction or scope of any of the provisions hereof. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or entity may require. Unless specified to the contrary, all references to "day" or "days" shall mean calendar day or days.

17.8 <u>Governing Law</u>. The interpretation, validity and enforcement of this Agreement, and all legal actions brought under or in connection with the subject matter of this Agreement, shall be governed by the law of the State of Ohio (except that any conflicts-of-law principles of such state that would result in the application of the law of another jurisdiction shall be disregarded).

17.9 <u>Publicity</u>. Neither Party shall issue a news release, public announcement, advertisement, sales promotions or other form of publicity concerning the existence of this Agreement or Services to be provided hereunder or the nature of the relationship between the Parties, or use the other Party's name, logo, trademarks, trade names, service marks or other proprietary marks in any manner, without obtaining the prior written approval of the other Party, which may be withheld in the other Party's sole discretion. Each Party shall have the right to review and approve any publicity materials, press releases or other public statements by another Party that refer to, or that describe any aspect of, this Agreement. Nothing in this Agreement establishes a license for any Party to use another Party's brands, marks or logos without the prior written approval of the other Party.

17.10 <u>Survival</u>. The terms and provisions contained in this Agreement that by their sense and context are intended to survive the performance thereof by the Parties shall survive the completion of performance and termination of this Agreement, including, without limitation, the making of any and all payments hereunder.

17.11 <u>Counterparts</u>. This Agreement may be executed in separate counterparts, each of which will be deemed an original and both of which together will constitute one and the same instrument.

[Signature page follows]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date.

Medina County Port Authority

By: _____

Its: Board Chairman – Medina County Port Authority

Dated: 11/01/17_____

By: _____

Its: *Dennis Hanwell, Mayor City of Medina*

Dated: _____12/12/2017_____

List of Exhibits

Exhibit A: Services

Exhibit B: Service Level Agreement

Exhibit C: Acceptance Testing

Exhibit D: Access Service Request

EXHIBIT A

SERVICES

MCPA offers scalable, Ethernet based fiber bandwidth from 5 Mb/s to 40 Gb/s without sacrificing security or architectural flexibility. MCPA is carrier neutral, allowing clients to leverage existing last mile or long-haul contracts without compromising data integrity, security or service levels.

Our regional ultra high-speed fiber-optic rings facilitate point-to-multipoint connectivity and multipoint interconnections while eliminating the need for expensive outlays for routers, switches, hardware and inflexible proprietary carrier contracts..

Our network uses multi-carrier network provisioning, management and quality of service (QoS) processes to ensure consistent end-to-end 24x7x365 performance. Bandwidth availability and redundancy are secured through multiple circuit, carrier and core Metro Area Network rings. Our network also mitigates packet loss through forward error correction (FEC) techniques, which reconstruct voice, video and data streams.

EXHIBIT B
SERVICE LEVEL AGREEMENT

Service Level Agreement Fiber Services

The following SLAs is supplied for Indefeasible Rights of Use (IRU) and leased fiber optic services

- o Standard Fiber Service Level Agreement – 99.999%

SLA is calculated in minutes of uptime in a calendar month by using the below formula:

- o Availability (Within a calendar Month) = (Total minutes in a month – total minutes of unavailability in Month) / Total minutes in a month

Mean time to repair (MTTR) is defined as the amount of time it takes to restore services measured from time to ticket being opened to time ticket is closed. The MTTR to repair Fiber Services is **four (4) Hours**.

The Following caveats cannot be covered by the SLA agreements. In the Event that one of the following events occurs the customer will be notified and kept apprised of service restoration.

- Act of Nature
- Act of God
- Catastrophic damage from any event that would affect a large area of the fiber optics system forcing new structure construction
- Unplanned Damage or removal of aerial or underground structure not owned by MCPA such as power poles, public conduit, public communication structures

Definition and Classification of Service Outages

Priority	Description
0 – Catastrophic Outage	• Priority 0 is defined as an entire network affecting outage that affects a large majority of customers and it caused by complete failure of a device or fiber optics system. • Priority 0 outage also includes a carrier partner network outage where all or most customers connected through a carrier partner is without service
1 – Critical Outage	• Priority 1 is defined as an outage affecting a single customer where service is unavailable for use.
2 – Major Outage	• Priority 2 outage is defined as an outage affecting a single customer where service is intermittent but still usable
3 – Minor Outage	• Priority 3 outage is defined as an outage affecting one customer where service is available but service is slow or minor packet loss
4 - Acknowledgement	• Priority 4 outage is defined as an outage affecting a single customer where service is available but specific applications are slow or not operating properly with customer configuration.
5 - Monitoring	• Priority 5 is defined as a circuit that is monitored due to intermittent problem to assist in looking at a possible future failure • Priority 5 is used for proactive troubleshooting to locate an issue before it becomes a minor, major, or critical issue.

Service Credits Sole Remedy. In the event of a Network Outage that is caused in whole or in part by the negligence or willful misconduct of Subscriber, Subscriber shall not be entitled to receive a credit. In all other cases of a Network Outage, except for maintenance or upgrade services scheduled with Subscriber and those pursuant to Section 10 "Force Majeure", Subscriber is entitled to receive a credit against the amount invoiced for Services provided during the month in which the Network Outage occurred. Credits are available on a per-Network-Outage basis, subject to a maximum credit of 50% of the basic monthly Recurring Charges required to be paid to the Development Corporation in any given calendar month. THESE CREDITS ARE THE SOLE REMEDY AVAILABLE TO SUBSCRIBER FOR SERVICE DISRUPTION OR SUSPENSION OF ANY KIND WHATSOEVER.

Service Credit Schedule Instance of Network Outage	Credit Against the Appropriate Month's Service Charge
Less than 4 hours	0%
4 hours to 8 hours	5%
More than 8 hours	10%

EXHIBIT C

ACCEPTANCE TESTING

The following acceptance tests will be conducted:

When MCPA believes that a Service is ready for use by Customer, MCPA shall notify Customer that the Service is ready for testing and acceptance. The test shall be coordinated and performed by MCPA.

Testing shall run for a continuous 1-hour period, mutually agreed upon by the Parties but not unreasonably delayed by Customer. This test will be performed by MCPA at the Customer Site Point of Demarcation or the patch panel at the drop-off demarcation point.

If the test results demonstrate that the Circuit meets the Technical Specifications, MCPA shall give electronic notice to Customer ("**Connection Notice**") along with a copy of the test result.

Customer shall have five (5) business days in which to notify MCPA of its acceptance or rejection of the Circuit. Customer shall accept the Circuit if it meets the Technical Specifications. If Customer delivers to MCPA, within five (5) business days after Customer's receipt of the Connection Notice, notice specifying non-conformance of the Service with the Technical Specifications as demonstrated by the test results ("**Non-Conformance Notice**"), MCPA shall use commercially reasonable efforts to remedy the installation and the testing and acceptance process shall be repeated.

In the event such test and accept process is repeated two additional times (i.e., after the original test) and the Circuit still does not meet the Technical Specifications, Customer may terminate the applicable ASR with respect to such Circuit only without liability.

Customer shall be deemed to have accepted the applicable Circuit if a Non-Conformance Notice is not delivered to MCPA within any five-day period provided for above, or if Customer uses the Circuit to carry customer traffic.

EXHIBIT D

ACCESS SERVICE REQUEST

I. **Services:**

Lit Fiber: ___X___   Dark Fiber: _____   Lateral Construction: ___Existing_____

Fiber count: 12 _X__ 24 ___ 48 ___ 72 ___ 96 ___ 144 ___

Bandwidth Agreement [Insert guaranteed minimum bandwidth]: ___NA_____

Leased Pair: _____   IRU Pair: _____

Point-to-Point: _____   Loop Fiber: ___X_____

Single-Entry: ___X_____   Dual Entry: _____

II. **Subscriber Locations:**

A.   MCFN Head-End: **A-Site:**   MCFN Backbone Fiber

B.   Subscriber Circuit Address: **Z-Site :** 132 N. Elmwood, Medina, OH 44256

III. **Demarcation Point:** 132 N. Elmwood, Medina, OH 44256

IV. **MCFN Equipment:**   Existing

V. **Fiber Installation at Subscriber Locations:**

A.   A-Site: Extend street fiber into City of Medina data center

B.   Z-site: Terminated fiber at 132 N. Elmwood, Medina, OH 44256

VI. **Site Connection, Service and Equipment:**

Charges		
	One-Time	**Monthly**
Installation Fee	$0.00	$0.00
Transport – 40 Mbps	$0.00	$500.00
Total	$0.00	$500.00

Contract total (36 months) - $18,000.00