

**AN ORDINANCE GRANTING A FRANCHISE TO GIGABEAM NETWORKS LLC
AND ITS AFFILIATES FOR THE CONSTRUCTION, MAINTENANCE AND
OPERATION OF A FIBER OPTIC NETWORK**

WHEREAS, GIGABEAM NETWORKS LLC (“GBN”) desires to install fiber optic cable in various areas of the Town of Blacksburg as part of the greater Montgomery County Broadband Project;

WHEREAS, a franchise is necessary for such use of Town rights-of-way;

WHEREAS, the negotiations having been completed and the requirements of Virginia Code § 15.2-2100, *et seq.*, complied with, the Town proposes to grant a franchise to GBN, in the form of this ordinance, to authorize its construction, maintenance and operation of a fiber optic network in a specific section of the Town’s streets;

THEREFORE, BE IT ORDAINED by the Council of the Town of Blacksburg, that:

Section I. Definitions

The following words and phrases shall have the following meaning, unless a contrary intent appears from the context of the provisions used.

- (a) "Town" means the Town of Blacksburg, Virginia.
- (b) "Grantee" means GigaBeam Networks LLC, a Virginia corporation having its administrative address at 704 Bland Street, Box 103, Bluefield, WV 24701.
- (b) "Street" means the public streets, alleys, avenues, highways, bridges, public utility easements and other public ways or places owned by or subject to the control of the Town of Blacksburg, in the Town.
- (d) "In the streets" shall include "under, along, or over the streets" and within public rights-of-way, when the physical situation so applies.
- (e) "Facilities" means the wires, fiber, conduits, lines, manholes, hand holds, cables, poles, fixtures, and equipment, and all necessary optronics, electronics, appurtenances and appendages thereto, for the construction and maintenance of a fiber optic network.
- (f) “Broadband internet access service” shall have the same meaning as defined by

federal law, 47 CFR section 8.1.

Section II. Grant Authority, Term

Subject to the provisions, conditions and restrictions set forth within this ordinance, the Council grants to Grantee the right to acquire, construct, repair, maintain, replace, and operate Grantee's fiber optic network Facilities in the streets of the Town of Blacksburg at the location described in Section VI, such right to continue for ten (10) years from the date Grantee accepts this franchise, and after the expiration of such ten (10) years to automatically renew for two additional five (5) year terms; provided, that Grantee is not in default hereunder. The rights and privileges herein set forth are granted and conferred upon the Grantee upon the express condition and understanding that it will maintain its properties, works, structures and Facilities located within the Town of Blacksburg in good order throughout the term of this franchise. Grantee is not providing cable service or telecommunications services within the Town's boundaries. If, in the future, Grantee wishes to provide these services, this franchise may be amended, or a separate franchise granted, to permit Grantee's provision of such services, subject to the requirements of Virginia Code §§ 15.2-2100, 15.2-2108.20, 56-462 and other applicable Virginia or federal law.

Section III. Territorial Area Involved

The franchise relates to the present territorial limits of the Town and to any area added to the territorial limits of the Town during the term of this franchise.

Section IV. Rights granted; franchise nonexclusive

This franchise shall be nonexclusive. Nothing herein shall be deemed to convey any right, title or interest in the public rights-of-way, but shall be deemed a franchise only to use and occupy the public rights-of-way for the limited purposes and terms stated herein. Nothing in this franchise shall be construed to prevent the Town from constructing, maintaining, repairing or relocating

sewers; grading, paving, maintaining, repairing, relocating and/or altering any street; constructing, laying down, repairing, maintaining or relocating any water mains; or constructing, maintaining, relocating, or repairing any sidewalk or other public work. Provided, however, that in the event such work is performed by the Town or its agents, and such work could reasonably affect the Grantee's Facilities, Grantee shall be given advance notice of such work and adequate time to relocate its Facilities prior to the commencement of such work. Further, this franchise shall not be construed as any warranty of title.

Section V. Use of Streets

(a) Grantee shall have the right to open and excavate in the areas governed by this franchise subject to the terms and conditions specified herein and those prescribed by the general ordinances of the Town from time to time adopted.

(b) Grantee shall obtain a permit from the Town and pay all required permit fees prior to opening the surface of any street or work requiring temporary road or sidewalk closures, which permit shall not be unreasonably withheld. The Town shall grant or deny the permit within thirty days from application. If the Town denies an application, it shall state the reasons therefor in writing, with the actions required to cure the denial. In opening the surface of any street and in making any excavation therein for any purpose, the Grantee shall not unnecessarily obstruct or impede traffic upon the streets and shall avoid any interference with, or injury to, the water, sewer mains and lines of the Town or any facilities of any public utility.

(c) Whenever the Grantee shall open or excavate in the streets, it shall act diligently in completing the necessary work and immediately after completion of the work it shall refill such opening or excavation in accordance with the Town's Utility Trench Repair Standards, latest edition. Grantee shall promptly restore, pavement, sidewalks, curbs, gutters, or other portions of Streets or

public ways damaged, disturbed or destroyed by such work, in accordance with the Town's Utility Trench Repair Standards, latest edition, and the Virginia Department of Transportation's Road and Bridge Standards and Specifications, latest editions.

(d) In an emergency, Grantee may conduct any maintenance, repair or other remedial measures without notice to Town. As soon after the termination of the emergency as is reasonably possible, Grantee shall report in writing to the Town any such emergency operations.

Section VI. Franchise Fee

As consideration for the grant of authority conferred by this franchise, Grantee shall provide the Town with the right to use a portion of Grantee's fiber optic network Facilities.

Specifically, Grantee is constructing a fiber optic network through the Town of Blacksburg, Virginia, as more particularly described on "Exhibit A" attached hereto, which Exhibit is incorporated by reference herein. In consideration for the grant of this franchise, Grantee shall continue to provide the Town the Indefeasible Right of Use ("IRU") of four (4) strands of fiber optic cable contained in Grantee's Facilities inside of Town limits. However, this IRU of the Grantee's fiber optic network does not convey ownership or legal title to the Grantee's network or Facilities.

The 4 strands provided for the Town's use shall be for the exclusive use of (i) the Town or (ii) any other state or local government entity that the Town may authorize to use these strands. Nothing in this Franchise shall allow the Town to use these fibers to provide telecommunications or broadband services for hire, sale or resale to the public or to any third party, except with Grantee's consent. The strands provided for the Town's use shall be of the same quality as the other strands composing the Grantee's network in the Town (in any event, at least 48 count Optical Cable fiber optic cable or better), and should be compatible with the Town's network to the maximum extent commercially feasible. Grantee will be responsible for all maintenance and repairs to the fiber optic

network during the term of this franchise, including the stands provided for the Town's use. Grantee shall provide the Town with reasonable access to the 4 strands of fiber optic cable at mutually agreed locations. Said access provided to the Town shall not authorize the Town to make any maintenance, repairs or alterations to Grantee's fiber optic network or the Facilities.

The failure of Grantee to provide the above-described capacity through the 4 strands provided for the Town's use for more than 48 hours shall be grounds of default, as addressed in Section XXI, unless such failure is caused by an event or circumstance beyond the control of Grantee. The Town Manager is authorized to enter into sub-agreements with Grantee to provide for the implementation and other operational details of this franchise; provided, however, that such agreements cannot be inconsistent with the terms of this franchise. In the event the requirements of this Section VI are found by a court to be inconsistent with state or federal law, Grantee agrees to 1) comply with all applicable requirements of local, state and federal law with respect to compensation for the use of the Town's Streets and 2) lease to the Town the four (4) fiber strands referenced herein for an amount not to exceed one hundred dollars (\$100) per year, which lease shall extend until the end of the term of this Franchise.

Section VII. Franchise subject to local and state laws.

The rights and privileges granted herein are expressly and continuously subject to the conditions, limitations and provisions contained in the general ordinances and Code of the Town of Blacksburg and the laws of the Commonwealth of Virginia so far as they may be applicable to this franchise, and the Grantee's compliance with such ordinances and laws. This franchise is subject to any and all ordinances and laws, which may be hereafter passed by the Town of Blacksburg and the Commonwealth of Virginia in the exercise of the powers vested in the Town and Commonwealth.

Section VIII. Insurance and Bond Requirements

(a) Grantee will obtain and maintain during the life of this franchise the insurance and bonds required by this section. Any required insurance or bond shall be effective prior to the beginning of any work within the Town. Grantee shall maintain insurance in the amounts of:

- (1) One Million Dollars (\$1,000,000.00) for bodily injury or death to any one (1) person;
- (2) Two Million Dollars (\$2,000,000.00) for bodily injury or death resulting from any one accident;
- (3) Two Million Dollars (\$2,000,000.00) for all other types of liability.

(b) All insurance shall meet the following requirements:

- (1) The Grantee shall furnish the Town a certificate or certificates of insurance showing the type, amount, effective dates and date of expiration of the policies. Certificates of insurance shall include any insurance deductibles.
- (2) The required certificate or certificates of insurance shall include substantially the following statement: "The insurance covered by this certificate shall not be canceled or materially altered, except after thirty (30) days written notice has been received by the Town of Blacksburg."
- (3) Insurance coverage shall be in a form and with an insurance company approved by the Town which approval shall not be unreasonably withheld. Any insurance company providing coverage shall be authorized to do business in the Commonwealth of Virginia.

(c) At the end of term of the franchise the Town shall have the right to require increases in the amounts of insurance specified above. Any adjustments shall bear a reasonable relation to any change in the cost of living or cost of repair or replacement, as measured by changes in the Consumer Price Index of the United States Bureau of Labor Statistics applicable to the

Commonwealth of Virginia or comparable measure if the Consumer Price Index is no longer being used.

(d) To secure its obligations under this franchise, Grantee shall post and maintain for the life of its franchise a performance bond or letter of credit in favor of the Town in the amount of five thousand dollars (\$5,000.00). The bond or letter of credit shall be conditioned upon the faithful performance by grantee of all terms and conditions of the franchise. A bonding company licensed to do business in the state of Virginia shall issue the bond, or a bank authorized to do business in the state of Virginia shall issue the letter of credit. The bond or letter of credit shall be in a form approved by the Town Attorney, and it shall contain the following endorsement:

“It is hereby understood and agreed that this bond may not be canceled without the consent of the town until sixty (60) days after receipt by the town by registered mail, return receipt requested, of a written notice of intent to cancel or not to renew.”

Section IX. Liability

Grantee shall keep and hold the Town free and harmless from any liability on account of injury or damage to persons or property growing out of or directly or indirectly resulting from (a) Grantee’s use of the Streets for the purposes authorized by this franchise; (b) Grantee’s acquisition, construction, reconstruction, erection, installation, operation, maintenance, repair or extension of Grantee’s Facilities; (c) Grantee’s exercise of any right or privilege granted by or under this franchise or (d) Grantee’s failure, refusal, or neglect to perform any duty imposed upon or assumed under this franchise. In the event that any suit or proceeding arising out of (a) through (d) of this Section IX shall be brought against the Town at law or in equity, either independently or jointly with Grantee on account thereof, Grantee, upon notice given to it by the Town, will defend the Town in

any such action or other proceeding, at the cost of the Grantee. In the event of a final judgment being awarded against the Town in any such proceeding, either independently or jointly with Grantee, then Grantee will pay such judgment or will comply with such decree, pay all costs and expenses of whatsoever nature and hold the Town harmless therefrom. This section shall not apply to the extent any such suit arises from the acts or omissions of the Town. Similarly, Grantee will only be liable for a final judgment to the extent of its adjudicated fault in such action or proceeding.

Section X. Award Fee and Franchising Costs

Grantee shall reimburse the Town for all reasonable costs, including publication fees, expended in the soliciting, processing and awarding of the franchise up to a maximum of \$500.00. Payment shall be made by Grantee, at the time of acceptance of this Franchise. The payment made pursuant to this section shall not be deemed to be a franchise fee.

Section XI. Street Vacation or Abandonment

(a) In the event that any street or portion thereof used by Grantee shall be vacated by the Town or the use thereof discontinued by Grantee, during the term of this franchise, Grantee shall have two options. Grantee may, at its own expense, remove its Facilities therefrom, and on the removal thereof restore, repair or reconstruct the street area where such removal has occurred, and place the street area where such removal has occurred to a condition similar to that existing before such removal took place. If Grantee elects to remove its facilities, but fails or refuses, after ninety (90) days notice by the Town, to remove any facilities or to repair, restore, reconstruct, improve or maintain such street portion, the Town may do such work or cause it to be done, and the cost thereof as found and declared by the Town shall be paid by Grantee as directed by the Town and collection may be made by any available remedy. Alternatively, in lieu of removing its facilities, Grantee may donate its Facilities, or any portion thereof, to the Town. For such donation to be effective, it must

be in writing and expressly accepted by the Town.

(b) The Town will notify Grantee of any proposed street vacation. If Grantee notifies the Town that it has Facilities within the subject street, and if the Facilities are presently in use, then the Town will not vacate the right of way without reserving a public utilities easement.

(c) In the event that Grantee discontinues the use of any street or portion thereof, Grantee shall, at Grantee's expense, remove or donate its Facilities as provided by preceding sub-paragraph (a).

Section XII. Temporary Movement or Relocation of Facilities

(a) In the event it is necessary temporarily to move or remove any of Grantee's Facilities, in order to lawfully move a large object, vehicle, building or other structure over the streets of the Town, upon four (4) weeks' notice by the Town to Grantee, Grantee shall move at the expense of the person requesting the temporary removal such facilities as may be required to facilitate such movements. In advance of any temporary move or removal, the Town shall advise any person requesting such action of the responsibility for paying Grantee's costs as provided herein.

(b) In the event it is necessary temporarily to move or remove any of Grantee's Facilities, in order to effect a repair of Town facilities, upon four (4) weeks' notice by the Town to the Grantee or upon such shorter time period as may be available in an emergency as deemed by the Town, Grantee shall move at its expense such Facilities as may be required to facilitate such repair. Should Grantee fail, refuse or neglect to comply with such notice, the facilities may be moved or removed by the Town, the cost of which shall be paid for by the Grantee, and the Town shall not be liable to the Grantee for any damages resulting from such removal, alteration or relocation.

Section XIII. Leasing of Facilities

Grantee shall have the unimpeded right to lease or license any part or portion of its

Facilities, conduit, duct space or fiber optic network, except for the 4 strands provided to the Town by this franchise, to any telecommunication carrier or telecommunications provider. The Town hereby reserves any and all rights it may have under applicable laws to regulate any entities which lease capacity from Grantee, including the right to seek compensation from such entities to the maximum extent provided under applicable laws.

Section XIV. Amendment

This franchise may be amended upon the written agreement of the parties. In the event the Grantee requests an amendment, the Grantee shall reimburse the Town for the reasonable costs and expenses related thereto. In the event the Town requests the amendment, the Town shall bear its costs and expenses related thereto.

Section XV. Forum Selection

By virtue of accepting this franchise, Grantee agrees and submits itself to a court of competent jurisdiction in Montgomery County, Virginia and further agrees that this franchise is controlled by the laws of the Commonwealth of Virginia or any applicable federal laws and that all claims, disputes, and other matters shall be decided only by such court according to the laws of the Commonwealth of Virginia or any applicable federal laws.

Section XVI. Approval of Transfer

Subject to the prior written approval by resolution of the Blacksburg Town Council, which approval shall not be unreasonably withheld or delayed, all rights and privileges hereby granted to Grantee may be exercised by any successor or successors, assigns or assignees of the Grantee, and said successor or successors, assigns or assignees shall be subject to all provisions, obligations and stipulations and penalties herein prescribed. Approval of the Blacksburg Town Council shall not be required if such successor(s) or assign(s) is an entity into which Grantee is merged or consolidated or

which acquires substantially all of Grantee's assets and property as a going concern; provided that any such entity assumes all of the obligations and liabilities of Grantee hereunder and agrees in writing to be governed by and subject to this franchise and its provisions, mutatis mutandis.

Section XVII. Provisions Inconsistent with General Laws.

Where any provision of this franchise is in conflict with any federal, state or local law, or rule of the State Corporation Commission of the Commonwealth of Virginia, or of any other duly constituted body or commission legally authorized to prescribe rules governing the conduct of the Grantee within the Town, so that the Grantee cannot reasonably comply with both the provisions of this franchise and the law or rule of such commission or body, then the Grantee shall comply with such law or specific rule instead of the conflicting provision of this franchise, but the Grantee shall comply with each and all of the provisions of this franchise where such can be done without violating the law or rules of the said commission or body. Whenever Grantee has knowledge of such a conflict, Grantee shall immediately notify the Town Manager in writing.

Section XVIII. Change in Law

In the event of a material change in the terms of this franchise as the result of a change in law, the parties shall negotiate in good faith to arrive at mutually agreeable amendments as are necessary to maintain the original intent of the franchise.

Section XIX. Default

(a) If the Grantee willfully or negligently fails to do any material act required in this franchise, it shall be in default if it has not performed the act within 30 days after written notice from the Town specifying the default.

(b) The Grantee may apply to the Town for additional time in which to cure a specified default, which permission will not be unreasonably withheld. Failure to cure within the specified

extension shall place the Grantee in default.

(c) The Grantee shall not be in default if failure to perform is caused by circumstances beyond the Grantee's control, including but not limited to fire, windstorm, flood or other acts of God or other events beyond the Grantee's control, provided that the Grantee takes all reasonable steps to cure the failure and to perform in as timely a manner as possible under the circumstances.

(d) In addition to any other remedy available to it, the Town may, by ordinance, declare a forfeiture of this franchise if Grantee has defaulted on a material provision of this ordinance, subject to the cure window provided in subsection (a) above.

Section XX. Notices

All notices and other communications required by this ordinance shall be in writing and shall be deemed to have been given on the date of actual delivery if mailed, first class, certified mail, return receipt requested, postage paid to the following addresses:

To the Town:
Town Manager
P.O. Box 90003
Blacksburg, Virginia 24062-9003

To GigaBeam Networks LLC
Administration
704 Bland Street, Box 103
Bluefield, WV 24701

Section XXI. Method of Acceptance.

Grantee shall have thirty (30) days from the date of adoption of this ordinance to accept this franchise. This Ordinance shall be and become effective when signed by the Grantee. Grantee shall reimburse the Town for its costs prior to its acceptance of this ordinance in accordance with Section X above.

Mayor

ATTEST:

Town Clerk

Introduction: _____

Public Hearing & Action: _____

APPROVED AS TO CONTENT:

APPROVED AS TO LEGAL SUFFICIENCY:

Town Manager

Town Attorney

ACCEPT:

GIGABEAM NETWORKS LLC

By: _____

Its: _____

Date: _____

Exhibit A

