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March 7, 2023

TO: Mayor and Board of Commissioners for Kill Devil Hills
Debora P. Diaz, Kill Devil Hills Town Manager

FROM: Casey Varnell, Town Attorney

RE: FIBER OPTIC FRANCHISE ORDINANCE

Dear Mayor and Commissioners:

Attached to this memorandum is an ordinance prepared by myself and Town Staff which would act to create a franchise concerning installation of fiber optic cables within the Town of Kill Devil Hills. Fiber optic cables, if installed within the Town's right-of-ways, would allow for the availability of high-speed internet services throughout the Town.

The Town has been approached by a company which has expressed interest in installing these fiber optic cables in Kill Devil Hills, being what has prompted this ordinance. The purpose of this ordinance is to ensure the Town has adequate control measures in place to regulate the placement, maintenance, repair, and/or removal of these cables as time progresses.

While the Town has not been presented with a formal proposal for the installation of fiber optic cables at this juncture, the Town Manager, Town Staff, and I find it best to consider adopting the attached ordinance in the event such a proposal is made and accepted by the Town.

I will note that this is not an amendment to our zoning code, meaning no public hearing is required in order to adopt the attached ordinance. After consideration by the Board of Commissioners, a motion would be in order on adoption of the same.

Sincerely,

Casey C. Varnell

ATTACHMENT TA-1

Ordinance Number _____

AN ORDINANCE AMENDING THE KILL DEVIL HILLS TOWN CODE,
TITLE XI: BUSINESS REGULATIONS

BE IT HEREBY ORDAINED BY THE Kill Devil Hills Board of Commissioners that Title XI: Business Regulations, of the Kill Devil Hills Town Code, shall be amended by deleting Chapter 113, Cable Services in its entirety, and adding the following the following language to the sections identified below, as follows:

CHAPTER 113: FIBER OPTIC CABLE SERVICES

Section

113.01 Definitions

113.02 Franchise granted

113.03 Town to be furnished indemnity against injuries, damage and nuisances

113.04 Obligation of company to furnish fiber optic services

113.05 Town to be furnished access to maps on request

113.06 Conditions of revocation

113.07 Notice

113.08 Binding effect

113.09 Changes or amendments

§ 113.01 DEFINITIONS.

For the purpose of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

COMPANY. _____, a corporation organized under the laws of the State of North Carolina and authorized to do business in the State of North Carolina and any successor in interest to _____ under this franchise chapter.

TOWN* or *TOWN OF KILL DEVIL HILLS. The Town of Kill Devil Hills, a municipal corporation located in Dare County, North Carolina; the area now or hereafter within the territorial town limits of the Town of Kill Devil Hills, or the Town Board of Commissioners or

any officer or agent duly authorized in acting on behalf of the town as a municipal corporation, as indicated by the context by which the term is used.

TOWN BOARD OF COMMISSIONERS. The governing body of the Town of Kill Devil Hills.

FIBER OPTIC CABLE. When used as an unqualified term shall mean a cable consisting of one or more thin flexible fibers with a glass core through which light signals can be sent with very little loss of strength.

§ 113.02 FRANCHISE GRANTED.

(A) The company is hereby granted a nonexclusive right to install, operate and maintain a fiber optic cable system within the town for the production, transmission, and distribution of high-speed internet services to consumers and users within the town and to the town and any and all agencies and departments thereof.

(B) (1) To the extent that the town may legally do so, the company is hereby granted the right, authority and privilege, after written notice delivered to the town, to install, operate, maintain, lay or relay, renew, replace and repair, (except no advance notice shall be required for emergency repairs) fiber optic cables, conduits, regulators, connections and services thereto (hereinafter "facilities"), in, through, across, along and under streets, avenues, roads, public alleys, lanes, and such other town properties and facilities as may be approved by the Town Manager (hereinafter "public properties") in the town for the production, transmission, and distribution of high-speed internet services to consumers and users within the town and to the town and any and all agencies and departments thereof, subject to the terms and conditions hereinafter set forth in this chapter. Such activities shall be conducted so as to minimize to the greatest extent practicable (within reasonable economic costs) inconvenience to the public, and damage to the area disturbed. All work shall be done with full consideration of the facilities and rights of others. All company activities shall be accomplished in accordance with the rules, regulations and standards of the North Carolina Utilities Commission and shall be subject to the provisions of the Kill Devil Hills Town Code. Company agrees to abide by all present and future laws, regulations and ordinances regulating utility cuts in public properties, but town shall not adopt any ordinance, rule or regulation which shall have the effect of modifying, amending, altering, or voiding all or any part of this franchise.

(2) Whenever the company shall cause any opening, excavation or alteration to be made in any public properties within the town in the construction, operation or maintenance of any of its facilities owned or used by it, the company shall repair and restore expeditiously such portions of such public properties to the same condition in which it found them as nearly as practicable. Additionally, if the company shall fail following completion of repairs to restore the area to its approximate former condition within a reasonable time, and a written notice is provided by the town to the company, the town may proceed after five calendar days' notice by mail or personally delivered to company to restore such public properties as nearly as practicable to their original condition, and the town shall submit a statement of the costs for this restoration to the company. The company agrees to pay the town for these costs within 30 days. Interest at 9% per

annum shall accrue on these costs beginning on the 31st day following the date that the town mails notice of such costs or the date that the town hand delivers such notice to company. Conflicts in elevations of company piping with town or other utilities that require adjustment of town or other utilities shall be at company's expense, and any damage to all such utilities while company is readjusting company facilities shall be the responsibility of company.

(3) In the case of temporary repairs, any opening, excavation or alteration in any public properties shall be backfilled immediately after the temporary repairs are finished, and the excavated area shall be kept in a safe condition by the company until the permanent repair is made. The permanent repair shall be made as expeditiously as possible.

(4) Except in emergency situations, the company shall not excavate in any public properties of the town until it shall obtain written approval from the town, which shall state in particular the location of proposed excavation and the approximate time to be required to complete the work at the excavated area. The town will act upon such requests within a reasonable time and shall not be unreasonable in refusing to grant approval of a company request. In no event though shall the town fail to cooperate with the company to reach agreement as to a commercially feasible method for the company to comply with its legal obligations in the provision of natural gas service. All excavations, back-filling and paving shall be subject to inspection by the town and shall be done according to the standard practice of the town in the installment of its water and sewer installations.

(5) In all cases where any public properties shall be excavated, disturbed or altered by the company, it shall take all precautions necessary or proper for the protection of the public and shall maintain adequate warning signs, barricades, signals and other devices necessary or proper to give adequate notice or warning to the public of the existence of all actual conditions and hazards present. Company shall undertake every reasonable option available to prevent creating a hardship to adjoining properties, including, without limitation, businesses and residences. Company agrees to abide by all present and future laws, regulations and ordinances regulating utility cuts in public properties, but town shall not adopt any ordinance, rule or regulation which shall have the effect of modifying, amending, altering, or voiding all or any part of this franchise.

(6) Whenever the town shall grade or re-grade any public properties in, along, under or across which the company shall have installed any of its facilities, and such grading or re-grading necessitates removal or relocation of such facilities for company to remain in compliance with federal or state law or regulation applicable to such facilities, it shall be the duty of the company, at the request of the town, at its own cost and expense, to promptly change said facilities so as to conform to the new grade which is then being or has been established.

(C) If the town decides to pave or repave a public property, it shall give 60 days prior notice to the company of the intention to pave or repave such street. When such notice is given, the company shall perform such work as the company deems necessary for the extension of new facilities or the repair or relocation of existing facilities within public property prior to the time the town begins paving or repaving of the public property. With prior written approval by the town, the company may perform such work as the company deems necessary for the extension of

new facilities or the relocation of existing facilities within public property after one year from the date that specific portion of the public property has been paved or repaved or if required to serve a customer that requests natural gas service and the company can economically provide such service.

(D) This franchise is granted for a term of _____ years beginning _____, 20____ and ending at midnight _____, 20_____. This franchise supersedes any and all former rights or franchises of the company to operate a fiber optic cable system in the town with respect to all acts and things done or admitted to be done, on or after _____, 20____.

(E) The company agrees to pay an annual franchise tax equal to the amount set by any applicable General Statutes of North Carolina and which sum shall be payable in accordance with such statutes. The grant of this franchise shall not cause the company to be liable for any other taxes, licenses or fees that it would not otherwise be chargeable with under state law.

(F) The company is hereby granted the right during the existence of this franchise to mortgage or hypothecate this franchise, together with all rights and privileges thereunder and any right or interest therein, as security for indebtedness, subject to acceptance by any such creditor or holder of indebtedness of the obligations, duties, liabilities, limitations and prohibitions set out herein and subject to approval by the North Carolina Utilities Commission or other governmental agency the approval of which is required by law. The company shall not assign or transfer its rights under this agreement, provided, however, that this provision shall not prohibit the company from assigning its rights hereunder to the surviving corporation in any corporate reorganization to which the company is a party.

§ 113.03 TOWN TO BE FURNISHED INDEMNITY AGAINST INJURIES, DAMAGE AND NUISANCES.

The company agrees that it will at all times indemnify and hold harmless the town, its officers, employees, and servants for each and all such nuisances, damage, injury (including death) loss, cost or expense (including reasonable attorney fees), caused or occasioned or contributed to by any act or failure to act, of the company, its officers, agents, servants and employees, in the construction, installation, repairing, maintaining, or operation of said facilities, including making cuts, disturbances and excavations in the public properties, except such indemnity shall not apply to any such loss, cost or expense caused by the negligence of the town; and the company shall secure and file with the town, if requested by the town, certificates for liability insurance in an amount of at least $2,000,000.

§ 113.04 OBLIGATION OF COMPANY TO FURNISH FIBER OPTIC CABLE SERVICES.

(A) Subject to the company's determination of economic feasibility in accordance with its criteria, the company agrees to deliver to and distribute for the use of the inhabitants, offices, businesses, commercial enterprises, churches, charities and professional establishments within the town, during the period of this franchise, and providing there is a demand for same, fiber

optic cable services which provide for high-speed internet in sufficient quantity to supply the demand customers within the town who may be served under the provisions of this franchise.

(B) Service interruptions or impairment for reasons beyond the control of the company shall not be a breach of this franchise, but such interruptions or impairments shall be corrected within a reasonable time with as little interruption as possible.

§ 113.05 TOWN TO BE FURNISHED ACCESS TO MAPS ON REQUEST.

The company shall from time to time, at the request of the town, allow town officials and/or employees to review or inspect maps of its transmission and distribution system within the town. The company shall maintain up to date, accurate copies of said maps at all times.

§ 113.06 CONDITIONS OF REVOCATION.

This franchise may be revoked only upon failure of the company to remedy any breach of its terms within 30 days after receiving notice in writing of such breach from the town or, if the breach cannot reasonably be cured within 30 days, the company must begin the cure within the 30-day period and thereafter proceed to complete the cure with due diligence.

§ 113.07 NOTICES.

All notices shall be in writing and hand delivered or mailed by registered or certified mail, return receipt requested, postage prepaid to:

Town of Kill Devil Hills

Attention: Town Manager

PO Box 1719

Kill Devil Hills, NC 27948

_____

_____

_____

_____

or to such other addresses as may be provided in writing from time to time. Mailed notices shall be deemed received three days after posting.

§ 113.08 BINDING EFFECT.

This franchise shall bind and inure to the benefit of _____ and the Town of Kill Devil Hills to the full extent allowed by applicable law.

§ 113.09 CHANGES OR AMENDMENTS.

No agreement, promise, term or condition not contained herein shall have any efficacy or validity. No change or amendment shall be effective until lawfully adopted by the town and agreed to by the company.

This amendment to Title XI: Business Regulations, Chapter 113, shall be in full force and effect from and after the _____ day of _____, 2023. Adopted and approved by the Board of Commissioners of the Town of Kill Devil Hills at a regular meeting held on the _____ day of _____, 2022, by a vote of _____ in favor and _____ opposed.

SEAL

_____
Ben Sproul
Mayor

ATTEST:

_____
James Michael O'Dell
Town Clerk

APPROVED AS TO FORM:

_____
Casey C. Varnell
Town Attorney

The undersigned hereby certifies that the foregoing official amendment, designated AN ORDINANCE AMENDING CHAPTER 153, ZONING, was placed in the Kill Devil Hills Town Code Book on the _____day of _____, 2023 at _____.m.

_____
James Michael O'Dell
Town Clerk