

(Published in the \_\_\_\_\_ on \_\_\_\_\_, 2015)

**ORDINANCE NO. 3458**

**AN ORDINANCE OF THE CITY OF FORT SCOTT, KANSAS, GRANTING TO KANSAS FIBER NETWORK, A KANSAS LIMITED LIABILITY COMPANY (KSFIBERNET), ITS SUCCESSORS AND ASSIGNS, A TELECOMMUNICATIONS FRANCHISE AND PRESCRIBING THE TERMS OF SAID GRANT AND RELATING THERETO.**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF FORT SCOTT, KANSAS:**

This Franchise Agreement (“Agreement”) is entered into as of **October 8<sup>th</sup>, 2015** (“Effective Date”) by and between the City of Fort Scott, a municipal corporation (the “City”), and KSFiberNet.

**RECITALS**

A. KSFiberNet owns, maintains, operates and/or controls, in accordance with regulations promulgated by the Federal Communications Commission and the Kansas Corporation Commission (hereinafter “KCC”), telecommunications networks serving KSFiberNet’s wireline customers through advanced fiber optic facilities and other wireless carrier customers through fiber-fed facilities. Such facilities are in public rights-of-way (hereinafter “ROW”), among other locations, in the State of Kansas.

B. KSFiberNet seeks to enter the City of Fort Scott’s (the “City”) ROW, and other real property of the City, to install, maintain and operate a fiber network (the “Network”), so that KSFiberNet and/or its customers (the “Customers”) may provide data and telecommunications services to the enterprises, residents and visitors of the City and others (the “Services”).

C. Some features of the Network include, without limitation, antenna nodes, poles, equipment cabinets, underground and above ground fiber optic cable, fiber hand holes and enclosures, fiber repeaters and related equipment, and will include other equipment as technology evolves, in a configuration and at locations to be filed and identified through the City permit process (“Facility” or “Facilities”).

D. Certain systems of KSFiberNet which are specific parts or types of the Facilities may be located on streetlights, stand-alone poles, thirty party utility poles, and other structures located on or within the Public ROW or City owned property as permitted under this Agreement.

E. KSFiberNet desires to obtain from City as permitted by law, and City is willing to grant KSFiberNet as required by law, the right to access the Public ROW to locate, place, attach, install, operate, use, control, repair, replace, upgrade, enhance and maintain the Facilities in a manner consistent this Agreement.

In consideration of the Recitals set forth above, the terms and conditions of this Agreement and other valuable consideration, the adequacy of which is hereby acknowledged, the parties agree as follows:

## **SECTION 1 INSTALLATION OF THE NETWORK**

**1.1 Permitted Installation.** KSFiberNet may at KSFiberNet's sole cost and expense and during the term of this Agreement, locate, construct, place, attach, install, operate, use, control, repair, replace, upgrade, enhance and maintain the Facilities subject to the terms and conditions of this Agreement. KSFiberNet shall undertake and perform any work authorized by this Agreement in a skillful and workmanlike manner.

**1.1.1 Installation Specifications.** The installation of the Facilities shall be made in accordance with plans and specifications as may be approved by the city and after obtaining all necessary permits for all work in the ROW and/or on City property. Such approval review shall be made no later than forty-five (45) days from application date, and under exceptional circumstances the time may be extended an additional forty-five (45) days upon agreement of the Parties. The Parties understand and agree that Facilities outside of the Public ROW may require additional easements for underground fiber to connect to Network within Public ROW. Such additional easements shall be located so as not to interfere with the city's use of its property. For each installation of Facilities, KSFiberNet shall provide to the City plans, specifications, a construction work breakdown, and anticipated construction timeframes for the installation of Facilities no later than ninety (90) days prior to the planned start of the installation. KSFiberNet shall, at the written request of the city, attend a planning session regarding an installation proposed by KSFiberNet. The location, depth of the fiber underground, and any other requirements shall be approved in writing by the City prior to construction of the Facilities at that specific location, approval of which shall not be unreasonably withheld, conditioned or delayed. Approval of plans and specifications and the issuance of any permits by the city shall not release KSFiberNet from the responsibility for, or the correction of, any errors, omissions or other mistakes that may be contained in the plans, specifications and/or permits. KSFiberNet shall be responsible for notifying the city and all other relevant parties immediately upon discovery of such omissions and/or errors and with obtaining any amendments for corrected City-approved permits as may be necessary. KSFiberNet shall be responsible for all costs associated with the permitting process, including, but not limited to, repairs and replacement of City ROW. Such permits and approval requirements detailed in this section shall not be unreasonably withheld, conditioned or delayed by the City and any conditions or requirements shall be in accordance with federal, state, and local laws.

**1.1.2 Temporary Construction.** The installation of the Facilities shall be performed in accordance with traffic control plans for temporary construction work that are approved by the City, which approval shall not unreasonably be withheld, conditioned or delayed.

**1.1.3 Construction Schedule.** If requested by the City, at least ten (10) days prior to the installation of the Facilities, KSFiberNet shall deliver to the City a schedule for the proposed work related to the construction of the Facilities, as well as a list of the names of all agents and contractors of KSFiberNet's authorized by KSFiberNet to access the City ROW and City owned property on KSFiberNet's behalf.

**1.1.4 Coordination of Work.** KSFiberNet shall be responsible for coordination of work to avoid any interference with existing utilities, substructures, facilities and/or operations within the City's ROW. KSFiberNet shall be the City's point of contact and all communications shall be through KSFiberNet. KSFiberNet shall be solely responsible for communicating with Kansas One-Call.

**1.1.5 Inspection by City.** The City shall have commercially reasonable access to inspect any work conducted by KSFiberNet during the installation, maintenance and/or repairs of the Facilities.

**1.1.6 Other Utility Providers.** When necessary, KSFiberNet shall coordinate with other utility providers for other needed utility services. KSFiberNet and the city will reasonably cooperate with the other utilities providers regarding the location of any meter, pole, and other apparatuses required for each Site.

**1.1.7 Existing Utility Poles.** KSFiberNet may attach its Facilities to an existing utility pole pursuant to a properly executed agreement with the pole owner, provided, however, that any necessary replacement of the pole in order to accommodate the attachment shall be subject to the proper exercise of the city's police powers, and in no instance shall KSFiberNet erect a new pole within an existing aerial pole line absent the City's prior authorization.

**1.2 Compliance with Laws.** This Agreement is subject to the terms and conditions of all applicable federal, state and local Laws and the Parties shall comply with any such Laws in the exercise of their rights and performance of their obligations under this Agreement. "Laws" or "Law" as used in this Agreement means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, permits, approvals or other applicable requirements of the city or other governmental entity or agency having joint or several jurisdiction over the Parties' activities under this Agreement or having jurisdiction that is applicable to any aspect of this Agreement that are in force on the Effective Date and as they may be enacted, issued or amended during the term of this Agreement.

**1.2.1 Permits.** KSFiberNet shall obtain any necessary encroachment permits from the City for the installation of the Network and for any other work within the City's ROW or other real property of the City, as required by the Code or State Law at K.S.A. 17-1902(N), as amended.

**1.3.3 Compliance with Permits.** All work within the City's ROW or other real property of the city shall be performed in strict compliance with all applicable Permits and all applicable regulatory requirements.

**1.3.4 Fee Increases.** If prior to the second anniversary of the date hereof, the city increases the permitting fees described in the Sections above, and if with respect to all similarly situated franchisee license agreements executed by the City in such 2-year period the franchisee or licensee is subject to a similar fee provision, then KSFiberNet will pay to the City the increased fees as if the increased fee schedule had been in effect as of the date hereof upon being billed therefor by the City.

**1.4 Placement of KSFiberNet Facilities.** KSFiberNet shall coordinate the placement of its Facilities in the Public ROW in a manner that minimizes adverse impact on public improvements, as reasonably determined by the City Engineer.

**1.4.1 Placement of City Facilities.** Should the City decide that it is in its interest to include capacity in addition to the Facilities planned by KSFiberNet during the installation, it will communicate this decision to KSFiberNet in writing prior to the start of any construction and KSFiberNet shall include this additional capacity in its installation. The additional capacity will be defined during the planning process outlined in 1.1.1 and may include, but is not limited to, conduit, handholes, enclosures, and cable lines. The additional capacity shall be determined no later than thirty (30) days prior to the planned start of the installation. The City shall reimburse KSFiberNet for the cost of the additional capacity. The City's cost will be limited to the actual material and direct labor of the additional facilities only. The additional facilities shall be inspected by the City along with the KSFiberNet Facilities and shall not interfere with the operation and maintenance of KSFiberNet Facilities. The additional facilities shall remain the exclusive property of the City. City may not resell the additional facilities to any third party.

**1.5 New Streetlight Poles and Existing Streetlight Poles.** It is understood that KSFiberNet may build new streetlight poles or other such facilities required for the installation of the Facilities which would comply with all encroachment and building permits, applicable City, state and federal specifications, and Laws ("New Poles"). The Parties agree that in areas where there are existing poles, KSFiberNet will work with the owner of that existing pole to collocate the DAS Facility, but only when the pole owner is willing to allow such attachment and where such attachment is feasible from a safety, technical, and engineering (structural and radio frequency coverage) perspective.

**1.5.1 City Use of New Poles.** The Parties understand and agree that the city may use any New Poles for City purposes, including but not limited to streetlights and other lighting so long as such use does not interfere with KSFiberNet's use of its Network or Facilities. KSFiberNet shall reasonably cooperate with the City when using the New Poles.

**1.5.2 City-Owned Lights.** Except for the installation of the lights and ancillary equipment on or in the New Poles and/or as set forth in section 1.5.3 below, KSFiberNet shall not be responsible for maintenance, repair, or replacement of City-owned lights, light bulbs and equipment or equipment owned by third parties authorized by the City on the New Poles.

**1.5.3 Damage to New Poles.** If a new Pole falls or is damaged such that there is an imminent threat of harm to persons or property, then the city may cause the New Pole to be removed to the side of the street or a location that City believes reasonably eliminates the right of such imminent threat or harm to persons or property. KSFiberNet shall, after written notice from the City that any New Pole has been damaged or removed, cause the New Pole to be repaired or replaced within thirty (3) days after the City's written notice. The cost to repair and/or replace any New Pole, including the replacement City streetlight, bulb and ancillary equipment shall be paid by KSFiberNet; provided, however, that if the new Pole is damaged or destroyed by the City or a third party user that the City has given the right to use the New Pole, then the City and/or its third party user shall pay the cost to repair and/or replace the New Pole. To the extent that KSFiberNet seeks reimbursement for a third party either directly or through applicable insurance, the City shall assign KSFiberNet any rights the City may have against such third party for such claims.

**1.6 Franchise and Permit Fees.** KSFiberNet is solely responsible for the payment of all lawful franchise and permit fees in connection with KSFiberNet's performance under this Agreement.

**1.6.1 5% Franchise Fees for all Gross Revenues.** In consideration of this Franchise Agreement, KSFiberNet agrees to remit to the City a franchise fee of five percent (5%) of Gross Revenues ("Franchise Fee"). "Gross Revenues" means revenues derived from services provided within the corporate boundaries of the City which include: (A) Recurring local exchange service for business and residence which includes basic exchange service, touch tone, optional calling features and measured local calls; (B) recurring local exchange access line services for pay phone lines provided by a telecommunications local exchange service provider to all pay phone service providers; (C) local directory assistance revenue; and (D) line status verification/busy interrupt revenue; (E) local operator assistance revenue; (F) nonrecurring local exchange service revenue which shall include customer service for installation of lines, reconnection of service and charge for duplicate bills; (G) RF telecommunications service revenue or any other operating revenue derived from leasing KSFiberNet's dark fiber and indefeasible rights of use "IRU") fees. Gross revenues shall be reduced by bad debt expenses that are attributable to Sections (A) through (G) as referenced within this Section 1.6.1. Uncollectable and late charges shall not be included within gross revenues. KSFiberNet shall pay its Franchise Fee on the 15<sup>th</sup> day of the second month following the month in which the Gross Revenue is received. Notwithstanding the above, to the extent the definition of Gross Revenues is inconsistent with the definition of "Gross Receipts" set forth in KSA 12-2001, the definition of Gross Receipts shall control.

**1.6.2 DAS Facility Permit Fee.** A one-time permit and license fee of \$1,000.00 for each DAS Facility installed within the Public Right of Way of the City shall be paid to the City by KSFiberNet. KSFiberNet shall pay the Das Facility Permit Fee the 15<sup>th</sup> day following the month after each DAS Facility is installed within the public ROW.

**1.6.3 Ministerial Application Fees.** Upon execution and approval of this Agreement, KSFiberNet shall pay to the City a one-time application fee in the sum of \$2,500.00 to recover the City's costs associated with the review and approval of this Agreement. The City certifies that such application fee reimburses the City for its reasonable, actual and verifiable cost of reviewing and approving this Agreement.

**1.6.4 Accounting Matters.** KSFiberNet shall keep accurate books of account at its principal office in Wichita, Kansas , or such other location of its choosing for the purpose of determining the amounts due to the City under §1.6.1 above. No more than once per year, the City may inspect KSFiberNet's books of account relative to the application of the franchise fees required under subsection 1.6.1 of this Agreement any time during regular business hours on thirty (30) days' prior written notice and may audit the books from time to time at the City's sole expense, but in each case only to the extent necessary to confirm the accuracy of payments due under § 1.6 – 1.6.3 above. The City agrees to hold in confidence any non-public information it learns from KSFiberNet to the fullest extent permitted by Law.

## **1.7 Access to the Facilities.**

**1.7.1 KSFiberNet Access to Facilities for Repair.** KSFiberNet will be given reasonable access to each of the Facilities in the City ROW or City owned property for the purposes of routine installation, repair, maintenance or removal of Facilities. If any such maintenance activities have the potential to result in an interruption of any City services at the Facility, KSFiberNet shall provide the City with a minimum of three (3) days prior written notice of such maintenance activities. Such maintenance activities shall, to the extent feasible, be done with minimal impairment, interruption, or interference to City services.

**1.7.2 City Observation.** KSFiberNet shall allow a representative of the City to observe any repair, maintenance or removal work performed at the Facilities.

## **SECTION 2 TERM AND TERMINATION**

**2.1 Term.** This Franchise Agreement shall be effective for an initial term of two (2) years from the effective date of this ordinance. Thereafter, this franchise will automatically renew for additional one (1) year terms, unless either party notifies the other party of its intent to terminate the franchise at least ninety (90) days prior to the termination of the then current term; provided, however, if KSFiberNet does not request termination and is operating hereunder and is not in default of its obligations hereunder, then this franchise shall not be terminated and shall continue

from year-to-year as provided herein. The additional (term(s) shall be deemed a continuation of this franchise ordinance and not as a new franchise ordinance or amendment. Under no circumstances shall this franchise ordinance exceed twenty (20) years from the effective date of the franchise ordinance. At the conclusion of the twenty (20) year period the parties hereto agree to negotiate a new franchise in good faith in the event KSFiberNet is still providing services hereunder.

**2.1.1 90 Day Remedy Period.** If the Agreement is breached by KSFiberNet, then-the provisions of Section 8 (Default) shall govern the parties hereto.

**2.2 Termination of Use.** Notwithstanding Section 2.1 above, KSFiberNet may terminate its use of any or all of the Network by providing the City with ninety (90) days prior written notice. In the event of any such termination, KSFiberNet payment obligations to the City shall terminate simultaneously with the termination of use; provided KSFiberNet removes its equipment and restores the Facilities, as set forth in Section 3, below, prior to the termination date.

### **SECTION 3 REMOVAL AND RELOCATION**

**3.1 Removal due to Public Project.** Upon receipt of a written demand from the City pursuant to this Section 3, KSFiberNet, at its sole cost and expense, shall remove and relocate any part of the Network, constructed, installed, used and/or maintained by KSFiberNet under this Agreement, whenever the City reasonably determines that the removal and/or relocation of any part of the Network is needed for any of the following purposes: (a) due to any work proposed to be done by or on behalf of the City or any other governmental agency, including, but not limited to, any change of grade, alignment or width of any street, sidewalk or other public facility, installation of curbs, gutters or landscaping and installation, construction, maintenance or operation of any underground or aboveground facilities used as sewers, water mains, drains, storm drains, pipes, gas mains, poles, power lines, telephone lines, cable television lines and tracks; (b) because any part of the Network is interfering with or adversely affecting the proper operation of City-owned light poles, traffic signals, or other City facilities or operations; or (c) to protect or preserve the public health and safety. The City shall cooperate with KSFiberNet in relocating any portion of the Network removed pursuant to this Section 3.1 in a manner that allows KSFiberNet to continue providing service to its customers, including, but not limited to, expediting approval of any necessary permits required for the relocation of that portion of the Network relocated under this Section 3.1. No permitting or other fees may be charged by the City for a removal occurring under this Section.

**3.2 Removal Due to Termination.** No later than 160 days after termination of this Agreement pursuant to the provisions of this Agreement, KSFiberNet shall, at its sole cost and expense, remove the Network or the terminated portion thereof and, if such removal disturbs the locations or adjacent property (including City ROW, City facilities added under Section 1.4.1, or

City real property), restore each Facility and its adjacent property to its original conditions, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment, or other aesthetic improvements made by KSFiberNet to the Facility or adjacent property, or as otherwise required by the City. For New Poles, KSFiberNet shall install a new streetlight or facility as directed by City's Public Works Director, or his or her designee. Alternatively, KSFiberNet shall abandon the Network, or any part thereof, in place and convey it to the City if either the City or KSFiberNet elects to do so.

**3.3 Abandonment.** In the event KSFiberNet ceases to operate and abandons the Network, or any part thereof, for a period of ninety (90) days or more, KSFiberNet shall, at its sole cost and expense and within the time period specified in Section 3.2, vacate and remove the Network or the abandoned part thereof. If such removal disturbs the Facility or adjacent property (including City ROW, City facilities added under Section 1.4.1 or City real property), KSFiberNet shall also, at its sole cost and expense, restore the Facility or adjacent property to its original conditions, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment, or other aesthetic improvements made by KSFiberNet to the Facility or adjacent property. Alternatively, the City may allow KSFiberNet, in the City's sole and absolute discretion, to abandon the Network, or any part thereof, in place and convey it to the City.

**3.4 No Relocation Compensation.** The parties understand and agree that neither the City nor KSFiberNet are entitled to compensation for any relocation of its Network that may be required under Section 3.1 KSFiberNet is not entitled to relocation assistance or any other compensation or benefits under the Uniform Relocation Assistance Act or any other applicable provision of law upon termination of this Agreement.

## **SECTION 4 MAINTENANCE AND REPAIR**

**4.1 Electricity Use.** KSFiberNet shall pay for the electricity and other utilities services it consumes in its operations at the rate charged by the servicing utility company.

**4.2 Maintenance and Repair.** KSFiberNet shall, at KSFiberNet's sole cost and expense, perform all maintenance and repairs reasonable needed to maintain the Network in good condition and neat and orderly appearance, and in compliance with all applicable Laws. In the event any part of the Network requires replacement because such part cannot be repaired, KSFiberNet shall, at KSFiberNet's sole cost and expense, replace the irreparable part of the Network. KSFiberNet shall not cause rubbish, garbage or debris on or around its Network or the Facilities and shall not permit rubbish, garage or debris to accumulate on or around in any enclosed areas around the Facilities. If the City gives KSFiberNet written notice of a failure by KSFiberNet to maintain the Facilities, KSFiberNet shall use its best efforts to remedy such failure within forty-eight (48) hours after receipt of such written notice.



4.3 **Appearance.** KSFiberNet shall cooperate with the City on all issues of aesthetics and appearance. KSFiberNet shall follow all legally binding City policies, state and local ordinances with respect to aesthetics. This includes, but is not limited to, historic site and/or locations of significant importance. All locations of DAS systems must be aesthetically approved by the City Engineering Department, in a manner consistent with other approvals within these Restrictions.

4.4 **Repair of ROW.** KSFiberNet shall be responsible for any damage, ordinary wear and tear excepted, to street pavement, existing facilities and utilities, curbs, gutters, sidewalks, landscaping, and all other public or private facilities, to the extent caused by KSFiberNet's construction, installation, maintenance, access, use, repair, replacement, relocation, or removal of the Network in the City's ROW. KSFiberNet shall promptly repair such damage and return the City's ROW and any affected adjacent property to a safe and satisfactory condition to the City in accordance with the City's applicable street restoration standards or to the property owner if not the City. KSFiberNet's obligations under this Section 4.4 shall survive for one (1) year past the completion of such reparation and restoration work and return of the affected part of the City's ROW by KSFiberNet to the City.

4.5 **Bond.** KSFiberNet shall provide a bond in the amount of \$100,000.00 during the construction of the Network to represent the estimated cost of KSFiberNet's construction obligations under Sections 3 and 4 of this Agreement, which the City may require KSFiberNet to increase from time to time to reflect the reasonable estimated cost of performing such obligations, to secure performance of KSFiberNet's obligations under Sections 3 and 4.

## **SECTION 5 TAXES**

5.1 **Taxes.** KSFiberNet agrees that it will be solely responsible for the payment of any and all taxes, fees and assessments levied on its ownership, use and maintenance of the Network and this Agreement. Pursuant to Section 79-5a01 *et seq.* of the Kansas Revenue and Taxation Code, the City hereby advises, and KSFiberNet recognizes and understands, that KSFiberNet's use of the City's ROW, the New Poles, and/or other non-ROW city property and facilities may create a possessory interest subject to real property taxation and that KSFiberNet may be subject to, and responsible for, the payment of real property taxes levied on such interest. KSFiberNet will cooperate with the Labette County Assessor in providing any information necessary for the Assessor to make a property tax determination. KSFiberNet reserves the right to challenge any such assessment, and the City agrees to cooperate with KSFiberNet in connection with any such challenge.

## **SECTION 6 INDEMNIFICATION**

6.1 **Indemnity.** KSFiberNet shall indemnify, defend, and hold harmless the City, its commission members, officers and employees, agents, and contractors, from and against liability, claims, demands, losses, damages, fines, charges, penalties administrative and judicial proceedings and orders, judgments, and the costs and expenses incurred in connection therewith, including reasonable attorneys' fees and costs of defense to the extent resulting from activities undertaken by KSFiberNet pursuant to this Agreement, except to the extent arising from or caused by the negligence or willful misconduct of the City, its commission members, officers, employees, agents or contractors or any third party. The City shall promptly notify KSFiberNet of any claim, action or proceeding covered by this Section 6.1.

6.2 **Waiver of Claims.** KSFiberNet waives all claims, demands, causes of action, and rights it may assert against the City on account of any loss, damage, or injury to any portion of the Network, or any loss or degradation of the services provided by the Network resulting from any event or occurrence except for any loss, damage, or injury to any portion of the Network, or any loss or degradation of the services provided by the Network resulting from the gross negligence or willful misconduct of the City.

6.3 **Limitation of City's Liability.** The City will be liable, if at all, only for the cost of repair to damaged portions of the Facilities arising from the negligence or willful misconduct of City, its employees, agents, or contractors. The City, its agents, officers, employees, or contractors, shall not be liable for any damage from any cause whatsoever to the Facilities, specifically including, without limitation, damage, if any, resulting from the City's maintenance operations adjacent to the Facilities or from vandalism or unauthorized use of the Facilities, except to the extent such damage is caused by the negligence or willful misconduct of City, its agents, officers, employees or contractors. The City will in no event be liable for indirect or consequential damages.

6.4 **Limitation of KSFiberNet's Liability.** In no event shall KSFiberNet be liable for indirect or consequential damages in connection with or arising from this Agreement, or its use of the Network, New Poles, and ROW or other City real property.

## **SECTION 7 INSURANCE**

7.1 **Minimum Insurance Requirements.** KSFiberNet shall obtain and maintain at its sole cost and expense for the duration of this Agreement insurance pursuant to the terms and conditions described in this Section.

(a) **Minimum Insurance.** KSFiberNet shall at all times during the term of this Agreement, carry, maintain, and keep in full force and effect, insurance as follows:

(i) **General Liability:** A policy or policies of Comprehensive General Liability Insurance, with minimum limits of \$2,000,000 combined single-limit per-occurrence for bodily

injury, personal injury, death, loss and property damage resulting from wrongful or negligent acts by KSFiberNet. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

(ii) **Automobile Liability:** A policy or policies of Comprehensive Vehicle Liability Insurance covering personal injury and property damage, with minimum limits of \$1,000,000 combine single-limit per accident for bodily injury and property damage covering any vehicle utilized by KSFiberNet in performing the work covered by this Agreement.

(iii) **Workers' compensation and Employer's Liability:** Workers' compensation limits as required by the Labor Code, and Employer's Liability limits of \$1,000,000 per accident.

(b) **Deductible and Self-Insured Retentions.** Any deductibles or self-insured retentions shall not exceed \$25,000; provided, however, if KSFiberNet's insurance policy expressly provides (i) that the insurer is required to pay covered claims with no deduction for all or any part of the KSFiberNet's deductible, and (ii) insurer's obligation to pay covered claims is triggered irrespective of whether or not the insured pays the deductible, the KSFiberNet's deductible shall not exceed \$100,000 for Comprehensive General Liability Insurance, \$100,000 Comprehensive Vehicle Liability Insurance and \$250,000 for Workers' Compensation and Employer's Liability coverage.

(c) **Other Insurance Provisions.** The policies shall contain, or be endorsed to contain, the following provisions:

(i) **General Liability and Automobile Liability Coverage.**

(1) The City, and its elected and appointed council members, board members, commissioners, officers and officials (the "Insureds") shall be named as additional insureds on all required insurance policies, except for Workers' Compensation and Employer's Liability policies.

(2) KSFiberNet's insurance coverage shall be primary insurance as respects the Insureds with respect to the matters covered by this Agreement. Any insurance or self-insurance maintained by the Insureds shall be in excess of KSFiberNet's insurance and shall not contribute with it.

(3) Any failure of KSFiberNet to comply with reporting provisions of the policies shall not affect coverage provided to the Insureds.

(4) KSFiberNet's insurance shall apply separately to each of the Insureds against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. Each of the Insureds is subject to all policy terms

and conditions and has an obligation, as an Insured, to report claims made against them to the insurance carrier.

(ii) **Workers' Compensation and Employer's Liability Coverage.** The insurer shall agree to waive all rights of subrogation against the Insureds for losses arising from work performed by KSFiberNet in the City's ROW.

(iii) **All Coverages.** Except for non-payment of premium, each insurance policy required by this clause shall be endorsed to state that coverage shall not be cancelled or reduced in coverage or limits by the insurer except after thirty (30) days' prior written notice has been given to the City. If for any reason insurance coverage is canceled or reduced in coverage or in limits, KSFiberNet shall within two (2) business days of notice from the Insurer, notify the City by phone or fax of the changes to or cancellation of the policy and shall confirm such notice via certified mail, return receipt requested.

(d) **Acceptance of Insurers.** Insurance shall be placed with insurers with an A.M. Best rating of no less than A-: VII.

(e) **Verification of Coverage.** KSFiberNet shall furnish the City with certificates of insurance required by this Section 7. The certificates for each insurance policy are to be signed by a person, either manually or electronically, authorized by that insurer to bind coverage on its behalf. All certificates are to be received and approved by the City before work commences.

(f) **Secondary Parties.** In the event KSFiberNet hires any subcontractors, independent contractors or agents ("Secondary Parties") to locate, place, attach, install, operate, use, control, replace, repair or maintain the Network, KSFiberNet shall require the Secondary Parties to obtain and maintain insurance commensurate to the work such Secondary Parties perform.

## **SECTION 8 DEFAULT**

### **8.1 Default.**

8.1.1 **Defined.** A "Default" shall be deemed to have occurred under this Agreement if a party fails to cure such within ninety (90) days after written notice specifying such breach, provided that if the breach is of a nature that it cannot be cured within ninety (90) days, a default shall not have occurred so long as the breaching party has commenced to cure within said time period and thereafter diligently pursues such cure to completion.

8.1.2 **Remedies.** Upon the failure of a party to timely cure any breach after notice thereof from the other party and expiration of the above cure periods, then the non-defaulting party may, subject to the terms of Section 6.3 (Limitation of Liability), terminate this Agreement and pursue

all remedies provided for in this Agreement and/or any remedies it may have under applicable law or principles of equity relating to such breach.

8.2 **City Termination Right.** In addition to the remedies set forth in Section 8.1.2, the City shall have the right to terminate this Agreement if (i) the City is mandated by law, a court order or decision, or the federal or state government to take certain actions that will cause or require the removal of the Facilities from the public right of way: or (ii) if KSFiberNet's licenses are terminated, revoked, expired, or otherwise abandoned. Such termination rights shall be subject to KSFiberNet's rights to just compensation, if any, for any taking of a protected property right.

8.3 **No waiver.** A waiver by either party at any time of any of its rights as to anything herein contained shall not be deemed to be a waiver of any breach of covenant or other matters subsequently occurring.

8.4 **Interest.** If KSFiberNet fails to make any payment under this Agreement when due, such amounts shall accrue interest from the date such payment is due until paid, including accrued interest, at an annual rate of ten percent (10%) or, if lower, the highest percentage allowed by law.

## **SECTION 9 INTERFERENCE**

9.1 **Non-Interference with Non-Public Safety Communications Systems.** KSFiberNet shall operate the Network in a manner that will not cause interference with City non-public safety communications systems and to the services and facilities of other licensees or lessees of City property located at or near the Facilities that were in operation prior to the installation of the Network or that are in operation prior to any modifications KSFiberNet may make to the Network.

9.2 **Non-Interference with Public Safety Communications Systems.** KSFiberNet's Network and Facilities shall not cause interference with public safety communications systems operated by City or any other public agency, regardless of the date such systems or any Facilities cause interference with the City's use of the New Poles for their intended purpose as streetlights, traffic lights, and/or stand-alone light poles.

9.3 **Correction of Interference.** If such interference with the Facilities described in Sections 9.1 and 9.2 occur, KSFiberNet shall, upon receipt of written notice thereof from City, immediately commence commercially reasonable, diligent, efforts to correct or eliminate such interference. If such interference cannot be corrected by KSFiberNet to the reasonable satisfaction of City within the cure period set forth for in the City's notice, which notice shall not be less than ninety (90) days, such interference shall be deemed a material breach under this Agreement and City may terminate this Agreement. Interference caused by actions of KSFiberNet's Customer(s) remains the responsibility of KSFiberNet. If the interference is an emergency or a danger to public health and safety, the City shall be entitled to require correction in a time period necessary to avoid the emergency or public health and safety issue.

## **SECTION 10 MISCELLANEOUS PROVISIONS**

10.1 **Nonexclusive Use.** KSFiberNet acknowledges that this Agreement does not provide KSFiberNet with exclusive use of the City's ROW or any municipal facility and that City retains the right to permit other providers of communications services to install equipment or devices in the City's ROW and on municipal facilities. The parties hereto specifically agree that all such franchises issued to telecommunications providers shall be competitively neutral and not unreasonable or discriminatory in nature.

10.2 **Notices.** All notices which shall or may be given pursuant to this Agreement shall be in writing and served by (1) electronic mail; and (2) personally served or transmitted through first class United States mail, or by express mail providing for overnight delivery, postage prepaid, to the following address or such other address of which a party may give written notice:

City: City of Fort Scott  
123 South Main  
Fort Scott, KS 66701  
Attention: Dave Martin, City Manager

KSFiberNet: Kansas Fiber Network, LLC  
8201 E. 34<sup>th</sup> St. North  
#1501  
Wichita, KS 67226  
Attention: Steven Dorf, President and CEO

Such notice shall be deemed made when personally delivered; of mailed via first class U.S. Mail, such notice shall be deemed made three (3) calendar days after the date of deposit in the U.S. Mail, if mailed via express/overnight mail, such notice shall be deemed made two (2) calendar days after the date of deposit in a designated overnight delivery mailbox or other like facility. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

10.3 **Sublease/Assignment.** If KSFiberNet assigns, sublets, enters into a franchise license or concession agreement, changes ownership of the Network or voting control of KSFiberNet, mortgage, encumber, pledge, hypothecate or other transfer (including any transfer by operation of law this Agreement or any interest therein) KSFiberNet will provide notice of a transfer within a reasonable time.

10.4 **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representatives, successor, assigns and transferees.

10.5 **Entire Agreement; Modification; Waiver.** This Agreement constitutes the entire agreement between the parties relating to the subject matter hereof. All prior and contemporaneous agreements, representations, negotiations, and understandings of the parties, oral or written, relating to the subject matter hereof are merged into and superseded by this Agreement. Any modification of amendment to this Agreement shall be of no force and effect unless it is in writing

and signed by the parties. No waiver of any of the provisions of this Agreement shall be deemed, or shall constitute, a waiver of any provisions, whether or not similar. No waiver or consent shall constitute a continuing waiver or consent or commit either party to provide a waiver in the future except to the extent specifically set forth in writing. No waiver shall be binding unless executed in writing by the party making the waiver.

**10.6 Severability.** If any one or more of the provisions of this Agreement shall be held by a court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision or provisions shall be deemed separable from the remaining provisions of this Agreement and shall in no way affect the validity of the remaining portions of this Agreement.

**10.7 Governing Law.** This Agreement shall be interpreted and enforced according to, and the parties' rights and obligations governed by, the domestic law of the State of Kansas or applicable federal law, without regard to laws regarding choice of applicable law. Any proceeding or action to enforce this Agreement, or otherwise directly related to this Agreement shall occur in the state courts located in Bourbon County, Kansas.

**10.8 Survival of Terms.** All of the terms and conditions in this Agreement related to payment, removal due to termination or abandonment, indemnification, limits of City's liability, attorneys' fees and waiver shall survive termination of this agreement.

**10.9 Captions and Paragraph Headings.** Captions and paragraph headings used herein are for convenience only. They are not a part of this Agreement and shall not be used in construing this Agreement.

**10.10 Drafting.** The parties agree that this Agreement is the project of joint draftsmanship and that should any of the terms be determined by a court, or in any type of quasi-judicial or other proceeding, to be vague, ambiguous and/or unintelligible, that the same sentences, phrases, clauses or other wording or language of any kind shall not be construed against the drafting party.

**10.11 Execution in Counterparts.** This Agreement may be executed in one or more identical counterparts and all such counterparts together shall constitute a single instrument for the purpose of the effectiveness of this Agreement.

**10.12 Authority to Execute This Agreement.** Each person or persons executing this Agreement on behalf of a party, warrants and represents that he or she has the full right, power, legal capacity and authority to execute this Agreement on behalf of such party and has the authority to bind such party to the performance of its obligations under this Agreement without the approval or consent of any other person or entity.

**10.13 No Warranty by the City.** The City makes no representations or warranties regarding the suitability, condition or fitness of the locations for the installation, maintenance or use of the New Poles or the Facilities.

10.14 **Agreement Applicable Only to the Facilities.** This Agreement shall not be construed to permit construction, installation, maintenance or use of Facilities on any property other than the Facilities.

10.15 **No Abrogation of Legal Responsibilities.** The City's execution of this Agreement shall not abrogate, in any way, KSFiberNet's responsibility to comply with all permitting requirements or to comply with all Laws with respect to its performance of the activities permitted under this Agreement.

10.16 **Contractual Interpretation.** In the interpretation and application of its rights under this Franchise Agreement, the City will act in a reasonable, non-discriminatory, and competitively neutral manner in compliance with all applicable federal, state, and local laws and regulations.

10.17 **Effective Date of Ordinance.** This Ordinance shall be effective upon its final passage and publication as required by law.



ADOPTED AND PASSED by the Governing body of the City of Fort Scott, Kansas, this  
6<sup>th</sup> day of October, 2015.

**CITY OF FORT SCOTT, KANSAS**

By:\_\_\_\_\_

JoLynne Mitchell, President

Fort Scott City Commission

ATTEST:

\_\_\_\_\_  
Diane K. Clay, City Clerk

**KANSAS FIBER NETWORK, LLC**

By:\_\_\_\_\_

Steven Dorf, President