

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING is made this ____ day of _____, 2015, by and between the City of Lawrence, Kansas, a municipal corporation, and Kansas Fiber Network, L.L.C., a Kansas limited liability company.

RECITALS

- A.** Pursuant to the laws of the State of Kansas and the ordinances of the City of Lawrence, Kansas, the authority to use the Public Rights of Way within the City of Lawrence, Kansas, is vested in the reasonable police powers of the City;
- B.** The City of Lawrence, Kansas ("the City"), a municipal corporation, owns a fiber optic network in the City of Lawrence, Kansas -- a portion of which is located within the Public Rights of Way -- and seeks to enhance that network;
- C.** Kansas Fiber Network, L.L.C. ("KFN"), a Kansas limited liability company, wishes to operate, within the City of Lawrence, Kansas, a fiber optic network and, in order to do so, wishes to place and install fiber optic cables and related facilities within the City's Public Rights of Way;
- D.** To achieve their goals, the City and KFN have reached a general understanding that, when possible, they will agree to work together for their mutual benefit and for the benefit of the inhabitants of Lawrence, Kansas;
- E.** This Memorandum of Understanding memorializes that understanding; both parties are cognizant that separate written agreements, delineating specific rights and obligations of the parties relating to specific projects will be necessary and that said agreements will be subject to this Memorandum of Understanding and appended hereto as addenda; and
- F.** To those ends, the City and KFN enter into this Memorandum of Understanding, the terms of which shall, unless otherwise expressly agreed upon by the parties in writing, govern generally the relationship between the City and KFN.

TERMS

- 1. Definitions.** For the purposes of this Memorandum of Understanding, the following words and phrases shall have the meanings given herein:
 - (a) "Cable Service"** means the one-way transmission to subscribers of video programming or other programming services and subscriber interaction, if any, which is required for the selection of such video programming or other programming service.

- (b) **"City"** means the City of Lawrence, Kansas.
- (c) **"Facilities"** mean all fiber optic cables and any appurtenances and improvements thereto, whether existing above or below ground.
- (d) **"KFN"** means Kansas Fiber Network, LLC, a Kansas limited liability company, and any and all successors and assigns.
- (e) **"Local Exchange Service"** means a local switched telecommunications service within any local exchange service area, regardless of the medium by which the local Telecommunications Service is provided. The term does not include any wireless telecommunication service.
- (f) **"Public Improvement"** means any existing or contemplated public facility, building, or capital improvement project, including but not limited to streets, alleys, sidewalks, sewers, water mains, drainage conduits, rights of way improvements, and other Public Projects.
- (g) **"Public Project"** means any project planned or undertaken by the City or any other governmental entity for the construction, reconstruction, maintenance, or repair of facilities or Public Improvements, or for any other public purpose.
- (h) **"Public Rights of Way"** mean those areas of real property in which the City has a right of way interest. It shall include the area on, below, or above present and future streets, alleys, avenues, roads, highways, parkways, boulevards, or bridges, either dedicated to or acquired by the City as rights of way. The term does not include easements acquired by utilities or private easements in platted subdivision, tracts, or lots.
- (i) **"Telecommunications Local Exchange Service Provider"** means a local exchange carrier and a telecommunications carrier, as those terms are defined at K.S.A. 66-1,187(h) and (m), and amendments thereto, which does, or in good faith intends to provide Local Exchange Service. The term does not include any interexchange carrier that does not provide Local Exchange Service and does not include any wireless telecommunications provider.
- (j) **"Telecommunications Service"** means providing the means of transmission, between or among points that are specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received.

2. **Limitations.** In using the Public Rights of Way for the operation of a fiber optic network, KFN acknowledges that it is subject to the following limitations:

- (a) KFN acknowledges that it does not have the authority to provide to the City or its inhabitants Cable Service or Local Exchange Service.
- (b) KFN acknowledges -- before using the Public Rights of Way to provide Cable Service, Local Exchange Service, or any other service for which a contract franchise is required by the City -- its obligation to enter first into a contract franchise with the City. This Memorandum of Understanding is not a contract franchise under K.S.A. 12-2001, *et seq.*, and shall not be so construed.
- (c) KFN acknowledges that nothing herein, nor any agreement appended hereto, shall convey to KFN title, equitable or legal, in any Public Right of Way of the City.
- (d) KFN acknowledges that nothing herein, nor any agreement appended hereto, shall be construed as giving KFN any exclusive rights or privileges.

3. **Use of Public Rights of Way.** In using the Public Rights of Way for the operation of a fiber optic network, KFN shall be subject to all ordinances, resolutions, regulations, rules, or policies now or hereafter passed, adopted, or promulgated by the City, or any governing body hereafter having jurisdiction, related to the use of Public Rights of Way. KFN shall also be responsible for procuring all necessary permits, licenses, certifications, grants, registrations, or other authorizations that may be required by the FCC, the KCC, the City, or any other governmental entity, subject to KFN's right to challenge in good faith any such requirement. In addition, KFN acknowledges that, in using the Public Rights of Way, it is subject to the following:

- (a) KFN acknowledges that its use of the Public Rights of Way shall, in all matters, be subject to and subordinate to the City's use of the Public Rights of Way.
- (b) KFN acknowledges that, except in cases of emergency, it shall submit to the City Engineer and the Director of Public Works, not less than thirty (30) days in advance of any construction, reconstruction, location, or relocation of any Facilities in a Public Right of Way, plans and specifications related to the proposed construction, reconstruction, location, or relocation. The City shall review said plans in order to minimize impacts to Public Improvements and existing improvements within the Public Rights of Way. The City shall not unreasonably withhold, delay, or condition approval of said plans and specifications.

- (c)** KFN acknowledges that, except in cases of emergency, it shall notify the City, not less than ten (10) days in advance of any construction, reconstruction, repair, location, or relocation of Facilities that will require any street closure or that will reduce the traffic flow to less than two lanes of moving traffic. The City shall follow its policies in the approval or denial of such authority, neither of which shall be unreasonably denied nor delayed. Except in cases of emergency, no such closure shall take place without the prior authorization of the City. All work performed in the traveled Public Rights of Way that in any way impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected. For all work performed within the Public Rights of Way, KFN shall comply with the Manual for Uniform Traffic Control Devices (MUTC) and the City's regulations, rules, and orders regarding the placement of signs, barricades, and other safeguards.
- (d)** KFN acknowledges that it shall be subject to all ordinances, resolutions, regulations, rules, or policies now or hereafter passed, adopted, or promulgated by the City relating to permits, sidewalk and pavement cuts, utility location, construction coordination, "Complete Streets," beautification, tree care, and other requirements that affect or may affect the use of Public Rights of Way.
- (e)** KFN acknowledges that, while engaging in any activity in the Public Rights of Way, that it will, at its sole costs and expense and to the reasonable satisfaction of the City, fully repair and replace any earth, material, sidewalks, paving, crossings, utilities, Public Improvements, or improvements of any kind that are injured, damaged, or removed in the course of its activities.
- (f)** KFN acknowledges that, as may be reasonably necessary, upon forty-five (45) days written notice from the City, it shall relocate or adjust any of its Facilities located in a Public Right of Way. Such relocation or adjustment shall be made or performed by KFN at its sole cost and expense, without any cost or expense to the City or its authorized agents and contractors, and shall be subject to the rules and regulations of the City.
- (g)** KFN acknowledges that it shall be its sole responsibility to take adequate measures to protect and to defend from harm and damage its Facilities in the Public Rights of Way. If it fails to accurately or timely locate its Facilities when requested, then KFN acknowledges that it shall have no claim for costs or damages against the City or its authorized agents and contractors or any other party authorized to be in the Public Rights of Way, except to the extent that such harm or damage is caused by such party's intentional or reckless conduct.

- (h) KFN acknowledges that, in constructing, reconstructing, installing, operating, testing, using, maintaining, and dismantling KFN's Facilities within the Public Rights of Way, it is subject to and will comply with all technical standards applicable to the work being done.
 - (i) KFN acknowledges that it will keep and maintain accurate records and as-built drawings depicting the accurate location of all Facilities constructed, reconstructed, located, or relocated within the Public Rights of Way and shall provide such information to the City upon request.
 - (j) KFN acknowledges that the City shall have the authority to prohibit its use or occupation of a specific portion of any Public Right of Way that is environmentally sensitive, as defined by federal, state, or local law or regulation, or that is within a designated historic district, as defined by federal, state, or local law or regulation.
4. **Street Tree Ordinance.** KFN shall comply with the provisions of the City's Street Tree Ordinance (Chapter 18, Article 1, of the Code of the City of Lawrence, Kansas, and amendments thereto) regarding the care, pruning, trimming, and removing of trees located in or on Public Rights of Way.
5. **Location of Facilities and Equipment.** In accordance with Chapter 5, Article 19 of the Code of the City of Lawrence, Kansas, and amendments thereto, KFN shall -- unless exempted either by the City Code or by written agreement of the parties, which agreement shall be appended hereto -- construct or install its Facilities within the Public Rights of Way underground. Where such underground construction or installation is made, KFN acknowledges that its Facilities and any necessary trenching shall be constructed, installed, maintained, and repaired by KFN in accordance with the City Code and at KFN's sole cost and expense. Nothing in this section, however, shall prohibit KFN from co-locating its Facilities on existing above-ground facilities and equipment.
6. **Interconnection.** KFN and the City acknowledge that this Memorandum of Understanding only authorizes the parties to work together to enhance their respective fiber optic networks. The fiber optic networks of the parties may interconnect only as may be necessary to accomplish specific projects, at mutually agreed upon points, and in accordance with specific terms established under separate agreements appended hereto. In such cases, each party shall be responsible for the maintenance of its respective fiber optic cables.
7. **Access.** This Memorandum of Understanding expressly prohibits the City, KFN, or any third party from having access to any shared portion of the fiber optic network, including handholes, manholes, conduit, fiber optic cables, or fiber termination rooms, without the prior written consent of the other.

- 8. Emergency Contact.** In case of an emergency affecting the other's fiber optic network, KFN and the City acknowledge that, as soon as may be practicable, it will notify the other party:

Emergency Contact Information-KFN

For Emergency Site Access or to report an outage, contact:

Primary:

Secondary:

Emergency Contact Information-City

For Emergency Site Access or to report an outage, contact:

Primary: **Todd Lohman, Traffic Supervisor; (785) 832-3035 or (785) 423-3339**

Secondary: **Kevin Harris, Project Inspector; (785) 832-3035 or (785) 423-3337**

Tertiary: **James Wisdom, Information Services Director; (785) 832-3326 or (785)**

- 9. Term.** This Memorandum of Understanding shall be effective for a period of ten years and will expire at 11:59 p.m. on December 31, 2025. Thereafter, this Memorandum of Understanding will renew for one additional ten-year term and be effective until 11:59 on December 31, 2035, unless either party notifies the other party in writing, not less than one hundred eighty (180) days before the termination of the initial ten-year term, of its intent to terminate or to renegotiate the terms of this Memorandum of Understanding. The additional term shall be deemed a continuation of this Memorandum of Understanding and not a new Memorandum or agreement.
- 10. Termination.** Either party may, by giving one hundred eighty (180) days' written notice to the other party, terminate this Memorandum of Understanding. Upon termination, whether by expiration of this Memorandum of Understanding or by notice given by either party, KFN will retain ownership of Facilities that belong to KFN and the City will retain ownership of Facilities that belong to the City. Upon expiration or termination, the parties rights will be governed by paragraph 18 of this Memorandum of Understanding.
- 11. Default.** The parties acknowledge that if either the City or KFN fails to perform or observe any material term, covenant, provision, or condition of this Memorandum of Understanding, or any written agreement appended hereto, then that party will be in default. In the case of default, the other party shall send to the party in default a Notice of Default.
- 12. Right to Cure.** From the date of written Notice of Default from the other party, the party in default shall have thirty (30) days to cure any default.

13. Failure to Cure. If the party in default fails to cure the default in the time prescribed by Section 12, *supra*, then the other party shall have the right to terminate this Memorandum of Understanding, or any agreement appended hereto, and may, at its discretion, pursue any other remedies that may be available to it at law or in equity and not otherwise proscribed by the terms of this Lease Agreement.

14. Indemnity and Damages.

(a) KFN, and any successor or assign, shall indemnify, defend, save, and hold harmless the City, its officers, commissioners, agents, employees, grantees, and assigns, from and against all claims, actions, liabilities, damages, costs, expenses, and judgments, including attorneys' fees, which relate to, arise out of, or are in any way associated with the KFN's use of the Public Rights of Way on account of any injury to persons (including death) or damage to property. This indemnification clause shall not apply to any injury or damage caused by the City's own negligence or intentional conduct. This indemnity provision shall extend beyond the termination or expiration of this Memorandum of Understanding.

15. Insurance and Performance Bonds.

(a) In using the Public Rights of Way for the operation of a fiber optic network, KFN acknowledges that it will obtain and maintain insurance coverage, at its sole cost and expense, with financially reputable insurers that are licensed to do business in the State of Kansas. Should KFN elect to use the services of an affiliated captive insurance company for this purpose, KFN shall obtain and possess a certificate of authority from the Kansas Insurance Commissioner. KFN shall provide, at a minimum, the following insurance:

(i) Worker's compensation as provided for under any workers' compensation or similar law in the jurisdiction where any work is performed with an employers' liability limit equal to the amount required by law.

(ii) Commercial general liability, including coverage for contractual liability and products completed operations liability on an occurrence basis and not a claims made basis, with a limit of not less than Two Million Dollars (\$2,000,000.00) combined single limit per occurrence for bodily injury, personal injury, and property damage liability. The City shall be included as an additional insured with respect to liability arising from KFN's operations under this License Agreement.

- (b) As an alternative to the requirements of Section 13(a), *supra*, KFN may demonstrate to the satisfaction of the City that it is self-insured and that it has the wherewithal to provide coverage in an amount no less than One Million Dollars (\$1,000,000.00) per occurrence and Two Million Dollars (\$2,000,000.00) in aggregate to protect the City from and against all claims by an person for loss or damage from death, personal injury, bodily injury, or property damage occasioned by KFN or so alleged to have been caused or to have occurred.
- (c) KFN shall, as a material condition of this License Agreement, prior to the commencement of any work, deliver to the City a certificate of insurance or evidence of self-insurance evidencing that the above insurance is in force and will not be cancelled or materially changed with respect to areas and entities covered without first giving the City thirty (30) days prior written notice. KFN shall make available to the City, on request, the policy declarations page and a certified copy of the policy in effect so that limitations and exclusions can be evaluated for appropriateness of overall coverage.
- (d) KFN or KFN's contractor shall, prior to commencing any construction of KFN's Facilities in a Public Right of Way, post a payment bond assuring that the construction of KFN's Facilities in the Public Right of Way will be constructed without the attachment of any construction liens.

16. Non-discrimination. KFN acknowledges that it will not, on the grounds of race, color, sex, religion, national origin, ancestry, disability, sexual orientation, sexual identity, or age, discriminate or permit discrimination against any person in the use of the Public Rights of Way or in activities sanctioned hereby or by an written agreement appended hereto as an addendum.

17. Transfer and Assignment.

- (a) Pursuant to the written permission of the City, which permission shall not unreasonably be withheld, KFN shall have the right to assign this Memorandum of Understanding and any agreement appended hereto to any person, firm, or corporation, and any such assignee, by accepting such assignment, shall be bound by all terms and provisions of the assigned agreement. If KFN should seek approval to assign this Memorandum of Understanding or any agreement appended hereto, KFN shall notify the City in writing. All such assignments shall be in writing and authenticated copies thereof shall be filed with the City Clerk. This Memorandum of Understanding and any agreement appended hereto shall be assignable in accordance with the laws of the State of Kansas.

(b) The foregoing restriction shall not apply in the case of sale, assignment, transfer, or lease by KFN to an affiliated interest; nor shall it apply to assignments made or security interests granted in order to secure financing. KFN shall, however, provide at least thirty (30) days' notice of such sale, assignment, transfer, or lease to an affiliated interest. The City retains the right to review the qualifications of any entity acquiring KFN's rights hereunder.

18. Expiration or Termination. Upon expiration of this Memorandum of Understanding, whether by lapse of time, by agreement of the parties, or by forfeiture, KFN shall have the right to remove any and all of its Facilities from the Public Rights of Way within a reasonable time after such expiration or termination or to transfer any and all of its Facilities to another entity authorized to place Facilities in the Public Rights of Way. It shall be the duty of KFN, immediately upon any such removal, to restore the Public Rights of Way from which said Facilities are removed to as good a condition as the same were in before said removal was effected.

19. Notice. All notices, requests, demands, or other communications hereunder shall be in writing and shall be deemed given if personally delivered or mailed, certified mail, return receipt requested, or by a recognized overnight delivery service, to the following addresses:

If to City, to:

City of Lawrence, Kansas
Attn: City Clerk
6 East 6th Street
P.O. Box 708
Lawrence, Kansas 66044

With a copy to:

City of Lawrence, Kansas
Attn: City Attorney
6 East 6th Street
P.O. Box 708
Lawrence, Kansas 66044

If to KFN, to:

Kansas Fiber Network, LLC
Attn: Bob Wallentine
121 N. Mead
Wichita KS 67202

With a copy to:

Victor Davis
Weary Davis L.C.
819 N. Washington St.
Junction City KS 66441

Any such Notice shall be deemed effective upon actual receipt or refusal of receipt as shown on any return receipt obtained under this Section.

- 20. Kansas Cash-Basis Law.** The parties mutually understand and agree that it is their intent that the terms of this Memorandum of Understanding and any addenda are lawful under the provisions of the Kansas Cash-Basis Law of 1933, codified as amended at K.S.A. 10-1101 *et seq.* Specifically, the parties understand and agree that the City is obligated only to make payments as may lawfully be made from **(a)** funds budgeted and appropriated for that purpose during the City's currently budget year or **(b)** funds made available from any lawfully operated revenue producing source.
- 21. Confidentiality.** The City acknowledges that any information provided to it by KFN shall be governed by confidentiality procedures in compliance with the Kansas Open Records Act of 1984, codified as amended at K.S.A. 45-215, *et seq.* In the event the City is required by law to disclose such information, the City shall provide KFN ten (10) days' advance notice of its intent to disclose such information and shall take such action as may be reasonably necessary to cooperate with KFN to safeguard such information. KFN agrees to indemnify and hold the City harmless from any and all penalties or costs, including attorney's fees, arising from the actions of KFN, or of the City at the written request of KFN, in seeking to safeguard the confidentiality of information provided by KFN to the City hereunder.
- 22. Reservation of Rights.** In entering into this Memorandum of Understanding, and any contract appended hereto, neither the City's nor KFN's present or future legal rights, positions, claims, assertions, or arguments, before any administrative body or court of law are in any way prejudiced or waived. Neither the City nor KFN waives any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or KFN may have at law or equity, without limitation, to argue, assert and/or take any position as to the legality or appropriateness of this Memorandum of Understanding or any agreement appended hereto or any present or future laws, ordinances, or rulings that may be the basis for the City or KFN entering herein.

- 23. Failure to Enforce.** The failure of either the City or KFN to insist in any one or more instances upon the strict performance of one or more of the terms or provisions of this Memorandum of Understanding or any contract appended hereto shall not be construed as a waiver or relinquishment of any right in the future to enforce such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment of any term or provision shall be deemed to have been made by the City or KFN unless said waiver or relinquishment is in writing and signed by both the City and KFN.
- 24. Entire Agreement.** This Memorandum of Understanding constitutes the entire understanding between the parties. This Memorandum of Understanding may only be modified by a writing signed by both parties and appended hereto as an addendum.
- 25. Severability.** If any section, sentence, clause, or phrase of this Memorandum of Understanding is found to be invalid by any court of competent jurisdiction, it shall not affect the validity of any remaining provision of this Memorandum.
- 26. Governing Law.** This Memorandum of Understanding shall be construed and enforced in accordance with and shall be governed by the laws of the State of Kansas.

[SIGNATURE PAGES TO FOLLOW]

IN WITNESS WHEREOF, the undersigned have caused this Memorandum of Understanding to be executed as of the date noted above.

**CITY:
CITY OF LAWRENCE, KANSAS, a
municipal corporation**

DAVID L. CORLISS
City Manager

ACKNOWLEDGMENT

THE STATE OF KANSAS)
) ss:
THE COUNTY OF DOUGLAS)

BE IT REMEMBERED, that on this ____ day of _____, 2015, before me the undersigned, a notary public in and for the County and State aforesaid, came David L. Corliss, as City Manager of the City of Lawrence, Kansas, who is personally known to me to be the same person who executed this instrument in writing, and said person fully acknowledged this instrument to be the act and deed of the aforementioned entity.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year last written above.

Notary Public

My Appointment Expires:

**KFN:
KANSAS FIBER NETWORK, L.L.C., a
Kansas limited liability company**

[INSERT NAME]
[Insert Title]

ACKNOWLEDGMENT

THE STATE OF KANSAS)
) ss:
THE COUNTY OF _____)

BE IT REMEMBERED, that on this ____ day of _____, 2015, before me the undersigned, a notary public in and for the County and State aforesaid, came _____, as _____ of Kansas Fiber Network, L.L.C., a Kansas Limited Liability Company, who is personally known to me to be the same person who executed this instrument in writing, and said person fully acknowledged this instrument to be the act and deed of the aforementioned entity.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year last written above.

Notary Public

My Appointment Expires: