

LEASE AGREEMENT

THIS Lease Agreement is made this ____ day of _____, 20__, by and between the City of Lawrence, Kansas, a municipal corporation, and _____, a (state) (corporation, limited liability company, etc.).

RECITALS

- A.** The City of Lawrence, Kansas ("City"), a municipal corporation, owns and operates, for its telecommunications needs and to enhance the services it offers to its residents, a fiber optic cable network.
- B.** Because it is cost-efficient to the City, when installing fiber optic cable, the City customarily installs the maximum feasible amount of fiber optic cable in its fiber infrastructure and, as a result, possesses surplus dark fiber.
- C.** In order to eliminate barriers to high-speed fiber-based internet services that exist within the City, the City has adopted a policy whereby it will lease surplus dark fibers to third parties, including private entities, on a competitively-neutral basis, for the purposes of using those surplus dark fibers to provide high-speed fiber-based internet services to businesses and residents of the City.
- D.** _____, a (state)(corporation, limited liability company, etc.) ("Lessee"), wishes to lease certain surplus dark fibers from the City for the purposes of providing high-speed fiber-based internet services to businesses and residents of the City (a map showing the surplus dark fibers leased from the City is affixed hereto as Exhibit A and incorporated herein by reference).
- E.** The City hereby agrees to lease to Lessee certain surplus dark fibers, as shown in Exhibit A affixed hereto, contingent upon Lessee's execution of this Lease Agreement and compliance with its terms.

TERMS

NOW, THEREFORE, in light of the mutual promises and obligations contained herein, and in exchange for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties, the parties agree as follows:

SECTION 1. Adoption of Recitals. The Recitals set forth above are hereby adopted and incorporated herein by reference as if set forth in full.

SECTION 2. Definitions. The following words, terms, and phrases, when used in this Resolution, shall have the following meanings:

- (a) **"Dark Fiber"** shall mean any fiber optic cable not in current use.
- (b) **"Fiber Infrastructure"** shall mean City-owned conduits, inner-ducts, vaults, and other facilities through which the City may use, maintain, and repair its fiber optic cable network.
- (c) **"Surplus Dark Fiber"** shall mean any City-owned fiber optic cable within its fiber optic cable network that is not currently in use by the City and which the City has not reserved for future use.
- (d) **"Symmetrical"** shall mean, in the context of internet services, equal speeds for uploading and downloading data/content from the internet.

SECTION 3. Lease of Surplus Dark Fibers. The City hereby agrees that, in exchange for the payment of the Annual Fee, unless waived in accordance with Section __, *infra*, and the giving of other good and valuable consideration, as further described herein, it will lease to Lessee Surplus Dark Fibers as shown in Exhibit A hereto, which the parties agree measures _____ miles ("Lessee's Fibers").

SECTION 4. Annual Fee.

- (a) In consideration for the lease of the Lessee's Fibers, unless waived by the City pursuant to subsection (b), *infra*, the Lessee shall pay as Rent, an annual fee of \$_____.00. Said annual fee shall be paid as a lump sum to the City Clerk on or before January 1 of each calendar year. Any Annual Fee received after January 15 shall be assessed a 5% late fee.
- (b) As an incentive for providing high-speed fiber-based internet services to businesses and residents of the City, the City hereby agrees to waive the Lessee's Annual Fee for the first five (5) years of this Lease Agreement if the Lessee performs each of the following:
 - (i) The Lessee provides and sustains service to at least three hundred (300) customers within the City and achieves that service level within twenty-four (24) months of the Commencement Date of this Lease Agreement. Upon the attainment of that goal, the Lessee shall submit an affidavit to the City certifying that it has met this goal and, upon confirmation, the City will rebate to Lessee any Annual Fee paid to date;

- (ii) The Lessee provides free high-speed fiber-based internet service to those households within its service area, having a net income at or below 140% of the net income eligible for food assistance as defined and published by the Kansas Department for Children and Families; and
- (iii) The Lessee provides free high-speed fiber-based internet service to not-for-profit organizations and institutions within its service area. Such free service does not have to be at the 100 megabits per second level.

SECTION 5. Term. The Initial Term of this Lease Agreement shall be five (5) years, commencing on the date that this Lease Agreement is executed by the parties ("the Commencement Date") and ending at 12:00 a.m. on January 1, 20__.

SECTION 6. Option Terms. Lessee and the City shall have the mutual option to extend the initial term of this Lease Agreement for two (2) additional and successive five (5) year option periods (individually, "the Option Term" and, collectively, "the Option Terms"). The Lease Agreement shall, at the end of the Initial Term or any Option Term, unless it is the second Option Term, automatically be extended an additional Option Term, unless either party notifies the other party of its intent to terminate or to renegotiate this Lease Agreement at least one hundred eighty (180) days prior to the termination of the then-current Term. Option Terms shall be deemed a continuation of this Lease Agreement and shall not be considered a new Lease Agreement or an amendment hereto.

SECTION 7. Use.

- (a) The Lessee shall, at Lessee's sole cost and expense, use the Lessee's Fibers to provide to businesses and residents of the City Symmetrical high-speed fiber-based internet services with a minimum capacity of 100 megabits per second, but can provide slower speeds at the request of the customer, subject to the terms and conditions established in this Lease Agreement. Failure to use the Lessee's Fibers to provide such internet services within one year of the date of this Lease Agreement shall be deemed a default under Section 11 of this Lease Agreement.
- (b) The Lessee further agrees that it shall use the Lessee's Fibers in accordance with all applicable federal, state, and local laws.
- (c) This Lease Agreement does not grant the Lessee the authority or right to provide "Cable Service" or "Local Exchange Service." For the purposes of this Lease Agreement, "Cable Service" is defined as 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.

- (d) This Lease Agreement is not a franchise agreement under K.S.A. 12-2001 *et seq.* The Lessee hereby acknowledges, however, its obligation to enter into a contract franchise with the City before using the Lessee's Fibers, which are located in the City's conduit in the public rights of way, for the provision of "Cable Services," "Local Exchange Service," or other Telecommunications Services to the City or its inhabitants.
- (e) The grant of this Lease Agreement shall not convey title, equitable or legal, to the Lessee in any property of the City, including Lessee's Fibers, the City's Fiber Infrastructure, or the City's public rights of way, and shall only give to the Lessee the right to use the Lessee's Fibers for the purposes and for the period of time stated in this Lease Agreement.

SECTION 8. Inter-connection.

- (a) Subject to the terms and conditions of the Lease Agreement, the City will bring the Lessee's Fibers to the demarcation points described in detail in Exhibit B to this Lease Agreement. The Lessee may only inter-connect with the Lessee's Fibers at and outside the described demarcation points. Exhibit B is affixed hereto and is hereby adopted and incorporated herein by reference as if set forth in full.
- (b) Any and all of the Lessee's inter-connections with the Lessee's Fibers, including equipment, labor, *etc.*, shall be at the sole cost and expense of the Lessee.
- (c) The Lessee may request, in writing, access to the Lessee's Fibers at additional demarcation points in the future. The City agrees to cooperate, to the extent that it is feasible, with such requests. All costs and expenses, including equipment, labor, *etc.*, of additional inter-connections shall be borne solely by the Lessee. In the event, additional demarcation points are created, the parties agree to amend Exhibit B to show the actual location of all demarcation points.
- (d) The Lessee may not have access to the Lessee's Fibers, except outside the demarcation points described in Exhibit B or any writing amending Exhibit B. The Lessee is also prohibited from having access to or any physical contact with the City's Fiber Infrastructure, except as outlined herein, and any fiber optic cable owned by the City.

SECTION 9. Maintenance and Repair.

- (a)** The City, or a City-approved vendor shall be solely responsible for maintaining or repairing the Lessee's Fibers on the City's side of the demarcation point. The Lessee shall cooperate with and assist the City, as reasonably may be required, in performing said maintenance or repairs. In the event of a disruption in service, the City shall begin restoration activities as soon as practicable after the City becomes aware of such disruption.
- (b)** Notwithstanding anything to the contrary contained herein, the Lessee shall solely be responsible, at its own expense, for the construction, installation, operation, maintenance, repair, and any other activity engaged by or on behalf of the Lessee relating to all light communications transmission equipment and other terminal equipment and facilities required in connection with the use of the Lessee's Fibers beyond the defined point of demarcation.
- (c)** The City, or a City-approved vendor of Lessee's selection shall be responsible for all necessary splicing of fiber optic cables. Where the City's fiber optic cables connect to the Lessee's Fibers, the associated Addendum or Service Order will detail and describe the Parties' splicing responsibilities. The Lessee may request and the City shall grant access to the Lessee's Fibers at additional access/splice points along the Route, provided that **(i)** such access/splice points are technically feasible in the City's reasonable opinion, **(ii)** the Lessee agrees to pay a reasonable splice fee to the City or a City-approved vendor at the time, **(iii)** all work is performed by the City or a City-approved vendor as provided herein, and **(iv)** the agreements governing the City's use and occupancy of the right of way at the access/splice points do not otherwise prohibit such access by parties other than the City.
- (d)** Should the Lessee perform, authorize, or contract any splices or other work not in accordance with the provisions of this Agreement, the City may at its option correct said condition. The City shall notify the Lessee in writing prior to performing such work whenever practicable. However, when such conditions pose an immediate threat to the physical integrity of the City's facilities, the City may perform such work and take such action that it deems necessary without first giving notice to the Lessee. As soon as practicable thereafter, the City shall advise the Lessee of the work performed and the action taken and shall endeavor to arrange for re-accommodation of the Lessee's Fibers so affected. The Lessee shall promptly reimburse the City for

all reasonable costs incurred by the City for all such work, action and re-accommodation performed by the City.

- (e)** The Lessee shall, at its sole cost and expense, promptly respond to and remediate any Hazardous Discharge to and from the City's Fiber Infrastructure resulting from the Lessee's operations.
- (f)** The City shall be responsible for obtaining and maintaining from the appropriate public or private authority any pole attachment agreements, franchises, licenses, state, local or right-of-way permits or other authorizations required to enter upon the property where the City's Fiber Infrastructure is located and to operate and maintain the Lessee's Fibers. The Lessee will not engage in any activity which affects the City's right of way interests without the written permission of the City.
- (g)** The Lessee, at its sole cost and expense, shall **(i)** use Lessee's Fibers and **(ii)** conduct all work in or around the City's Fiber Infrastructure safely and in a manner reasonably acceptable to the City, so as not to physically, electronically, or inductively conflict or interfere or otherwise adversely affect the City's Fiber Infrastructure or the facilities placed therein by the City or by any third party.
- (h)** The Lessee must obtain prior written authorization, which such authorization shall not be unreasonably withheld, conditioned, or delayed, from the City approving any further work and the party performing such work before the Lessee shall perform any work in or around the City's Fiber Infrastructure.
- (i)** In the event that the Lessee learns that Lessee's Fibers are damaged, it shall notify the City of said damage by telephone at (785) 832-3035 or by e-mail at tlohman@lawrenceks.org. In the event that the City learns that the Lessee's Fibers are damaged, the City will notify the Lessee of said damage by telephone. In each case, the caller shall provide the following information:
 - (i)** Name of entity making report.
 - (ii)** Location reporting problem.
 - (iii)** Name of contact person reporting problem.
 - (iv)** Description of the problem in as much detail as possible.
 - (v)** Time and date the problem occurred or began.

- (vi) State whether or not the problem presents a jeopardy situation to the City's Fiber System or the Lessee's Fiber Optics.
- (j) The City shall designate the particular strands of Surplus Dark Fiber that will constitute the Lessee's Fibers and the location and manner in which they will enter and exit the City's Fiber System. That information shall be contained on each executed Addendum.
- (k) If the City moves, replaces or changes the location, alignment or grade of the City's Fiber Infrastructure ("Relocation"), the City shall concurrently relocate the Lessee's Fibers. If the Relocation is because of an event of *Force Majeure* or of any governmental or third party authority, including and taking by right of eminent domain, the Lessee shall reimburse the City for the Lessee's proportionate share of the costs of the Relocation of the City's Fiber Infrastructure. To the extent the City receives reimbursement from a third party which is allocable to a Relocation of the City's Fiber Infrastructure, it will credit or reimburse the Lessee for its proportionate share of the reimbursement. If the City relocates the City's Fiber Infrastructure solely for its own benefit, the Lessee shall not be required to reimburse the City for the costs of the Relocation. The Lessee's proportionate share shall be the combined calculation of: (i) a fraction, the numerator of which shall be the number of conduits occupied by the Lessee's Fibers and the denominator of which shall be the total number of conduits affected in the City's Fiber Infrastructure, and (ii) a fraction, the numerator of which shall be the number of strands of Lessee's Fibers and the denominator of which shall be the total number of strands in the City's Fiber Infrastructure containing the Lessee's Fibers.

SECTION 10. Reporting Requirements. The Lessee shall submit an annual report to the Governing Body no later than January 31st of each year, reporting on the benefits accruing to the community based on its activities under this Lease Agreement during the preceding calendar year. The report shall include, but not be limited to the following: the location and purpose of each Surplus Dark Fiber (Lessee's Fibers) leased from the City; the extent to which the Lessee improved businesses' and residents' access to high-speed, fiber-based internet services; and shall certify, by affidavit, whether the Lessee has provided services to lower-income residents and not-for-profit organizations and institutions within its service area.

SECTION 11. Default. If either the City or the Lessee fails to perform or observe any material term, covenant, provision, or condition of this Lease Agreement, then that party will be in default under this Lease Agreement.

SECTION 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.

SECTION 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 Lease Agreement and may, at its discretion, pursue any other remedies that may be available to it at law or in equity not otherwise proscribed by the terms of this Lease Agreement.

SECTION 14. Force Majeure.

- (a) A "*Force Majeure* Event" is any event or cause beyond the reasonable control of the party claiming relief, including any action by or omission of a governmental agency or authority (including any government-imposed moratorium on activities related to this Lease Agreement or any subsequent change in government rules, regulations, codes, ordinances, or laws), material shortages, third-party labor disputes, floods, earthquakes, fires, lightning, epidemic, war, riot, civil disturbance, act of public enemy or enemies, terrorist act, sabotage, or any act of God.
- (b) Neither the City nor the Lessee will be considered in default under this Lease Agreement if such party's performance is delayed by virtue of a *Force Majeure* Event. Upon the occurrence of such event, the parties agree to confer in good faith and to agree upon an equitable, reasonable action to continue performance under this Lease Agreement. The City and the Lessee will use commercially reasonable efforts to minimize the delay caused by any *Force Majeure* Event and to resume affected performance when reasonably possible.
- (c) In the event that a *Force Majeure* Event prevents either party from performing under the contract for a period of 180 days, then either party, upon written notice to the other, may terminate this Lease Agreement. Upon such termination, all parties will be relieved of performance under this Lease Agreement, except that a party will continue to be liable for any breaches that occurred and were not cured prior to termination.

SECTION 15. Rights upon Expiration or Termination of the Agreement. Upon the expiration or termination of this Lease Agreement, the Lessee's rights to the Lessee's Fibers shall terminate and the Lessee's Fibers shall revert to the City. Upon expiration or termination of this Lease Agreement, the Lessee shall have no continuing rights or obligations hereunder, except that any uncured defaults or any other obligations that are stipulated in this Lease Agreement shall survive the expiration or termination of this Lease Agreement. Any and all equipment furnished or supplied by the Lessee to inter-connect to the Lessee's fibers shall remain the property of the

Lessee. Any and all equipment furnished or supplied by the City under this Lease Agreement shall remain the property of the City.

SECTION 16. Insurance.

- (a)** The Lessee agrees to obtain and maintain the following insurance:
(i) Commercial General Liability, including coverage for **(A)** premises/operations, **(B)** products/completed operations, **(C)** personal and advertising injury, and **(D)** contractual liability, with a combined single limit of not less than \$1,000,000.00 each occurrence or the equivalent;
(ii) Workers' Compensation in amounts required by applicable law and Employer's Liability with a limit of at least \$1,000,000.00 each accident;
(iii) Automobile Liability, including coverage for owned/leased, non-owned, or hired automobiles with combined single limit of not less than \$300,000.00 each accident; and **(iv)** umbrella coverage with a limit of at least \$1,000,000.00.
- (b)** The Lessee will obtain and maintain "all risk" property insurance in an amount equal to the full replacement cost of all electronic, optronic, and other equipment that the Lessee will utilize in connection with its inter-connection with and use of the Lessee's Fibers.
- (c)** Unless otherwise agreed upon by the parties in writing, all insurance policies obtained and maintained by the Lessee shall be with companies rated A or better by Best's Key Rating Guide and the Lessee will, upon request, provide the City with insurance certificate(s) confirming compliance with the terms of this Section.
- (d)** Notwithstanding anything to the contrary in this Lease Agreement, the City and the Lessee mutually waive their rights of recovery against each other, including against officers, directors, shareholders, partners, joint venturers, employees, agents, customers, invitees, or business visitors, for any loss arising from any cause covered or that would be covered by fire, extended risk, "all risk," or other insurance required to be carried under this Lease Agreement or currently or hereafter existing for the benefit of the respective parties. The Lessee will obtain from the insurance company providing the coverage required by this Lease Agreement, a waiver of subrogation against the City.
- (e)** In the event that the Lessee fails to maintain the insurance coverage required by this Lease Agreement and a claim is made or an injury is suffered, the Lessee agrees, in addition to what is set forth in Section 16, *infra*, to indemnify and to hold harmless the City from any and all claims for which the required insurance would have provided coverage.

- (f) With respect to all activities under this Lease Agreement, the City will be self-insured.

SECTION 17. Indemnification.

- (a) The Lessee, and any successor or assign, agrees to 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 Lessee's use of the Lessee's Fibers and activities taken in the public rights of way under the terms of this Lease Agreement on account of any injury to persons (including death) or any damage to property. This indemnification clause shall not apply to any injury or damage caused by the City's own negligence or the City's intentional conduct. This indemnity provision shall extend beyond the termination or expiration of this Lease Agreement.
- (b) The City and the Lessee shall promptly advise the other in writing of any known claim or demand against the Lessee or the City related to or arising out of the Lessee's activities under this Lease Agreement.

SECTION 18. Limitation of Liability. Neither party shall be liable to the other for lost profits, special, incidental, punitive, exemplary, or consequential damages, including but not limited to frustration of economic or business expectations, loss of profits, loss of capital, cost of substitute product(s), facilities, or services, or down time costs, even if advised of the possibility of such damages. Further, the liability of one party to the other for damages under this Lease Agreement, excluding liabilities relating to a party's indemnification obligations as set forth in Section 17, *supra*, or any other damages permitted under this Lease Agreement, is limited to the total amount payable by the Lessee to the City under this Lease Agreement to which the dispute relates.

SECTION 19. Assignment. This Lease Agreement may not be sold, assigned, transferred, or sublet without the prior written approval or consent of the City's governing body.

SECTION 20. Authorization. Each of the persons executing this Lease Agreement, in behalf of the respective parties, represents and warrants that he or she has the authority to bind the party in behalf of whom he or she has executed this Lease Agreement, and that all acts required and necessary for authorization to enter into and to execute this Lease Agreement have been completed.

SECTION 21. Notice. All notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed given if personally delivered or mailed by first class mail:

If to the City, to:

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

With a copy to:

City of Lawrence, Kansas
Attn: Director, Legal Department
6 East 6th
P. O. Box 708
Lawrence, KS 66044

If to Lessee, to:

Either party may change where notices, requests, demands, or other communications are to be given by giving written Notice to the other party of any said change.

SECTION 22. Successors and Assigns. This Lease Agreement shall be binding upon and inure to the benefit of the parties, their respective heirs, personal representatives, successors, and assigns.

SECTION 23. Non-waiver. Failure of either party to insist on strict performance of any of the conditions, covenants, terms, or provisions of this Lease Agreement or to exercise any of its rights hereunder shall not waive such rights, but the party shall have the right to enforce such rights at any time and to take such action as might be lawful or authorized hereunder, whether in law or equity.

SECTION 24. Personal Immunities. No personal recourse shall be had for the creation of this Lease Agreement, for any claim arising out of this Lease Agreement, nor for any representation, obligation, covenant, or agreement set forth in this Lease Agreement, against any past, present, or future officer, member, employee, or agent of the City, under any rule of law or equity, any statute or constitution, or by the enforcement of any assessment or penalty, or otherwise, and any liability of any such officer, member, employee, or agent is hereby expressly waived and released by the Lessee as a condition of and in consideration for the execution of this Lease Agreement. Furthermore, the Lessee agrees that no past, present, or future officer, member, employee, or agent of the City shall be personally liable to the Lessee, or

any successor in interest of the Lessee, for any default or breach under this Lease Agreement by the City.

SECTION 25. Severability. If any section, sentence, clause, or phrase of this Lease Agreement is found to be invalid by any court of competent jurisdiction, it shall not affect the validity of any remaining provision of this Lease Agreement.

SECTION 26. Governing Law. This Lease Agreement shall be governed by the laws of the State of Kansas.

SECTION 27. Miscellaneous.

- (a) This Lease Agreement supersedes all prior discussions and negotiations and contains all agreements and understandings between the City and the Lessee with respect to the subject matter hereof. This Lease Agreement may only be amended by a writing signed by all parties.
- (b) Exhibits "A" and "B" are incorporated into this Lease Agreement by reference.
- (c) The provisions of the Lease Agreement relating to indemnification shall survive any termination or expiration of this Lease Agreement. Any provision of this Lease Agreement that would require performance subsequent to the termination or expiration of this Lease Agreement shall likewise survive any such termination or expiration.
- (d) This Agreement is contingent upon the Lessee, or any successor or assign hereunder, obtaining all necessary governmental approvals, permits, or licenses.
- (e) This Agreement is contingent upon the Lessee being a corporation in good standing with the Kansas Secretary of State. Any corporate successor or assign hereunder must also be a corporation in good standing with the Kansas Secretary of State (OPTIONAL; If corporation)
- (f) This Lease Agreement may be executed in duplicate counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one (1) or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument.

- (g)** The prevailing party in any litigation arising hereunder shall be entitled to reimbursement from the other party of its reasonable attorneys' fees and court costs, including the prosecution of any appeal.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the undersigned have caused this Lease Agreement 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)
)
THE COUNTY OF DOUGLAS) ss:

BE IT REMEMBERED, that on this ____ day of _____, 20__, 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 commission expires:

LESSEE:

{Name}
{Title}

ACKNOWLEDGMENT

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

BE IT REMEMBERED, that on this ____ day of _____, 20__, before me the undersigned, a notary public in and for the County and State aforesaid, came _____, as _____ of _____, a _____, 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 commission expires: