

RESOLUTION NO. 11/22/16-1

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A RESOLUTION AUTHORIZING THE EXECUTION AND DELIVERY BY THE CITY  
OF GARNETT OF AN AGREEMENT WITH KANSAS FIBER NETWORK, LLC TO  
PERMIT USE OF CITY UTILITY POLES.  
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WHEREAS, Kansas Fiber Network, LLC intends to expand its  
fiber optic network into the City of Garnett; and,

WHEREAS, Kansas Fiber Network, LLC desires to utilize some  
of the City of Garnett utility poles in connection with such  
expansion; and,

WHEREAS, the parties have reached an agreement upon which  
such joint pole usage can be accomplished, substantially in the  
form as attached hereto and marked "Exhibit A".

NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF THE  
CITY OF GARNETT, KANSAS, that the mayor and city clerk be and  
they are hereby authorized and directed to execute and deliver a  
Pole Attachment Agreement with Kansas Fiber Network, LLC  
substantially in the form of the agreement attached to this  
resolution and marked, "Exhibit A".

ADOPTED this \_\_\_\_\_ day of November, 2016.

\_\_\_\_\_  
Greg A. Gwin, Mayor

\_\_\_\_\_  
Jody M. Cole, Commissioner

\_\_\_\_\_  
W. Gordon Blackie, Commissioner

ATTEST:

\_\_\_\_\_  
City Clerk

## POLE ATTACHMENT AGREEMENT

This Agreement entered into this 22nd day of November 2016, by and between KANSAS FIBER NETWORK, LLC ("KSFIBERNET"), a Kansas limited liability company, and the City of Garnett, Kansas ("CITY"), a City in Anderson County, Kansas. KSFIBERNET and CITY are collectively referred to herein as "Parties" and individually as a "Party."

### WITNESSETH:

**WHEREAS**, KSFIBERNET intends to expand its fiber optic network by developing, constructing, installing and operating one or more fiber optic routes in the Garnett, Kansas, area; and KSFIBERNET desires to use certain of CITY's Structures in furtherance of same;

**WHEREAS**, CITY desires to permit KSFIBERNET to use its Structures in consideration of the covenants and agreements of KSFIBERNET set forth in this Agreement and upon and subject to the terms and conditions provided herein;

**NOW, THEREFORE**, in consideration of the mutual covenants and terms and conditions contained herein, the Parties mutually covenant and agree as follows:

### I. DEFINITIONS

"Agreement" means this Agreement and all extensions and modifications hereof, together with all attachments, appendices and schedules.

"Fiber" means fiber cable and related fiber strands, splices and terminations to be installed on and between Structures along the Route pursuant to this Agreement.

"NEC" means National Electrical Code, as amended.

"NESC" means National Electrical Safety Code, as amended.

"Plans" means general design and construction plans for the Fiber to be installed along the Route.

"Route" means the specific route(s) upon which the Fiber will be located as described in an applicable Plan submitted to the City on a per project basis pursuant to Article III.1(a) below.

"Structures" means wood or metal poles or any combination thereof and steel lattice transmission towers and any other related facilities owned and/or controlled by CITY.

### II. GRANT OF SPECIFIC RIGHTS

1. **Grant of License to KSFIBERNET.** In consideration of the pole attachment fee described in Paragraph 2 below and the other covenants, terms and conditions contained in this Agreement, CITY, throughout the Term, hereby grants to KSFIBERNET a royalty-free, non-exclusive fiber optic license to install, construct, monitor, repair, maintain and operate Fiber on any Structure located within the City

pursuant to a properly submitted Plan as further described in Article III.1(a) below. CITY shall have the right to grant, by contract or otherwise, to others not Parties to this Agreement, rights or privileges to use any of the Structures covered by this Agreement, and CITY shall have the right to continue and extend any such rights or privileges heretofore granted.

2. **Pole Attachment Fee.** In consideration of the license described in Paragraph 1 above and the other covenants, terms and conditions contained in this Agreement, KSFIBERNET agrees to pay an annual pole attachment fee to CITY for each Structure utilized by KSFIBERNET along the Route. CITY shall invoice KFN annually beginning on the first anniversary of the Effective Date of the Agreement and continuing through the remainder of the Initial Term and any Renewal Term. KSFIBERNET will perform a validation of pole attachments for which it is being invoiced within thirty (30) days of receipt of an invoice and, upon confirmation of the number of pole attachments, pay CITY thirty days thereafter. In the event of a dispute regarding the number of pole attachments, the parties will work in good faith to resolve such dispute in accordance with Article III.18 below.

KSFIBERNET may, at any time, remove its attachments from any Structure of CITY, but no refund of any current year rental will be due on account of such removal. The annual per pole fee will be \$5.00 for each calendar year.

3. (a) **Ownership of KSFIBERNET Facilities.** KSFIBERNET will retain ownership of the Fiber to be installed along the Route, and CITY shall acquire no right, title or interest in or to the Fiber.

(b) **Ownership of the Distribution Structures.** All Structures covered by this Agreement shall be and remain the property of CITY, and KSFIBERNET shall, except for the rights provided in this Agreement, acquire no right, title or interest in or to the Structures.

### III. GENERAL TERMS AND CONDITIONS

1. (a) **Construction and Installation.** KSFIBERNET shall submit Plans to CITY prior to construction and installation on the Structures along the Route. CITY may reject the Plans only if the said Plans (i) fail to comply with reasonable and customary design and construction practices or (ii) fail to comply with the minimum requirements of applicable governmental regulations and codes including the National Electrical Code (“NEC”) and National Electrical Safety Code (“NESC”). Once KSFIBERNET’s Plans have been approved by CITY, the construction and installation of the Fiber upon the Structures along the Route may begin.

(b) All Fiber shall be constructed in accordance with the approved Plans and installed in a manner, which is reasonable and customary in the industry. All such Fiber shall be constructed, installed and at all times maintained by KSFIBERNET so as to comply at least with the minimum requirements of all applicable governmental regulations and codes including, without limitation, the NEC and NESC.

2. **Necessity for Alteration (Make-Ready) or Relocation.**

(a) **No Alteration Required.** If CITY determines that any attachment space so requested is suitable and available without necessity for altering or relocating any of CITY's or any existing joint or

other user's property or equipment, CITY shall approve and return the Plans and license form to KSFIBERNET showing the estimated make ready cost to be zero.

(b) **Alteration Required.** If CITY determines to make available any attachment space so requested, but that alteration or relocation of CITY'S equipment or replacement of one or more of CITY's Structures will be necessary to provide the attachment space requested, CITY shall send to KSFIBERNET the estimated cost for the alteration, relocation, replacement, or make-ready work.

If KSFIBERNET thereafter determines to make said attachment, a copy of the Plans and license form shall be approved by KSFIBERNET and returned to CITY, and KSFIBERNET shall reimburse CITY for the cost of such alteration, relocation, replacement, or make-ready work upon notice from CITY of completion of such work.

3. (a) **Maintenance of Facilities.** KSFIBERNET shall, at its own expense, at all times maintain all of the Fiber in a safe condition in thorough repair and in accordance with NESC requirements and any other applicable standards or requirements.

(b) KSFIBERNET shall give at least two days' notice to CITY before performing any nonemergency maintenance on any of the Fiber. For any emergency maintenance, KSFIBERNET shall give CITY at least one hour's notice. Such notice shall be given to the CITY at 785-448-5496 (telephone number) during regular business hours of 8:00 a.m. to 5:00 p.m. Monday through Friday or at 785-448-6823 (Law Enforcement Center) after hours or on holidays.

(c) In the event of emergency maintenance needed to be performed on the Structures, CITY reserves the right to commence and complete any such electric maintenance or restoration work prior to allowing KSFIBERNET access to repair or maintain its Fiber. If requested by CITY personnel, KSFIBERNET shall cease repair work and vacate the repair site until CITY's maintenance and restoration procedures are complete.

4. **Term.** This Agreement shall become effective upon its execution and shall continue in effect for a term of 20 years ("Initial Term"). Thereafter, the Agreement shall automatically renew from year to year ("Renewal Term"). The Agreement may be terminated by either Party at the end of the Initial Term or at any time thereafter by providing 18 months' notice of termination to the other Party.

5. **Insurance.** KSFIBERNET shall, at its sole expense, cause to be issued and maintained during the Term of this Agreement insurance coverages of the types and in the amounts set forth below, as applicable:

<b><u>Type of Insurance</u></b>	<b><u>Limit</u></b>	
General Liability (including	Combines Aggregate	\$2,000,000
contractual liability) written	Prod./Comp. Op. Agg.	\$1,000,000
on an occurrence basis	Personal & Adv. Injury	\$1,000,000
	Each Occurrence	\$1,000,000

Automobile Liability, including any auto, hired auto and non- owned autos	Combines Single Limit	\$1,000,000
Excess Liability, Umbrella Form	Each Occurrence	\$2,000,000
	Aggregate	\$2,000,000
Workers' Compensation	Each Accident	\$ 500,000

6. **Liens.** In the event any construction lien or other encumbrance shall be placed on the Structures because of the actions of KSFIBERNET, KSFIBERNET shall promptly discharge the lien or release the encumbrance without cost or expense to CITY, and hereby agrees to indemnify CITY for any and all damages that may be suffered or incurred by CITY, as a result of the lien, discharging the lien or releasing the encumbrance. In the event any construction lien or other encumbrance shall be placed on the Fiber because of the actions of CITY, CITY shall promptly discharge the lien or release the encumbrance without cost or expense to KSFIBERNET and hereby agrees to indemnify KSFIBERNET for any and all damages that may be suffered or incurred by KSFIBERNET as a result of the lien, discharging the lien, or releasing the encumbrance.

7. **Relationship of Parties and Independent Contractor Status.** Neither CITY nor KSFIBERNET shall be deemed to be a partner, agent or joint venturer with or of the other by reason of this Agreement or the consummation of the transaction contemplated hereby. All Parties shall perform their duties under this Agreement as independent contractors, and at their own risk. Neither CITY nor KSFIBERNET shall at any time hold itself out as being a partner, co-venturer or agent of the other.

8. **Successors and Assigns.**

(a) *Generally.* This Agreement shall be binding upon, and shall inure to the benefit of and be enforceable by, the Parties hereto and their respective successors and permitted assigns. Unless otherwise set forth herein, neither of the Parties may assign this Agreement to any other person or entity without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed.

(b) *Exceptions.* Notwithstanding the foregoing,

(i) the Parties may assign this Agreement without the consent of the other Party to any affiliate of such Party, to the surviving entity into which such Party may merge or consolidate, or to any entity to which the Party transfers all, or substantially all, of its business and assets; and

(ii) KSFIBERNET shall also have the right, without the consent of CITY, to assign or otherwise transfer this Agreement as collateral to any lender to KSFIBERNET (or lender to any successor or assign of KSFIBERNET); provided that the assignee or transferee in any such circumstance shall continue to be subject to all of the provisions of

this Agreement, except that any lender shall not incur any obligations under this Agreement, nor shall it be restricted from exercising any right of enforcement or foreclosure with respect to any related security interest or lien, so long as the purchaser in foreclosure is subject to the provisions of this Agreement.

9. **Notices.** All notices, requests, demands and other communications required or permitted to be given or made under this Agreement shall be in writing, and shall be deemed to have been duly given (a) on the date of personal delivery, (b) on the date of delivery by a nationally recognized overnight delivery service, (c) on the date of deposit in the U.S. mails, postage prepaid, by certified mail, return receipt requested, or (d) on the date of transmission by telephonic facsimile transmission, in each case addressed as follows, or to such other addresses or facsimile numbers as shall be designated from time-to-time by the Parties pursuant to this Paragraph 8:

If to KSFIBERNET to:  
Kansas Fiber Network, LLC  
8201 E 34<sup>th</sup> Street, Cir N, Bldg. 1500  
Wichita, KS 67226  
Attn: President

If to CITY to:  
City of Garnett, Kansas  
131 West Fifth Avenue  
Garnett, Kansas 66032  
Attn: City Attorney

10. **Force Majeure.** In the event KSFIBERNET or CITY is delayed in or prevented from performing any of its respective obligations under this Agreement due to acts of God, war, riots, civil insurrection, acts of civil or military authority, fires, floods or earthquakes beyond the reasonable control of the Party delayed, then such delay or nonperformance shall be excused. If any such delay or nonperformance due to the foregoing causes or events occurs or is anticipated, the Party affected shall promptly notify the other Party in writing of such event or expected event and the cause and estimated duration of such event. The Party affected by such event shall, at no cost to the other Party, exercise due diligence to shorten or avoid the delay or nonperformance and shall keep the other Party advised as to the continuance of the delay and steps taken to shorten or terminate the delay or nonperformance.
11. **Limitation of Liability.** NEITHER PARTY SHALL HAVE ANY RESPONSIBILITY, LIABILITY OR OBLIGATION TO THE OTHER OR THE OTHER'S AFFILIATES, DIRECTORS, OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES, SUCCESSORS OR PERMITTED ASSIGNS FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, COST OF REPLACEMENT SERVICES, LOSS OF CUSTOMERS OR AGENTS, LOSS OF USE, OR PENALTIES IMPOSED BY OTHERS, REGARDLESS OF ANY ACT OR OMISSION OR COMMISSION IN CONNECTION WITH OR UNDER THIS AGREEMENT.
12. **Disclaimer.** THERE ARE NO AGREEMENTS, WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR USE, EXCEPT THOSE EXPRESSLY SET FORTH HEREIN.

13. **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be regarded as an original and all of which together shall constitute one and the same document.
14. **Expenses.** Except as otherwise expressly provided herein or therein, each Party shall bear the costs and expenses incurred by it in negotiating, entering into and performing any of its obligations under this Agreement.
15. **Headings.** The headings of this Agreement are inserted for convenience only and shall not be deemed to be a part hereof.
16. **Applicable Law.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Kansas applicable to contracts made and to be performed entirely in that state, without regard to the conflicts of laws rules of that state.

The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the texts of the Communications Act of 1934 (“Act”) and the orders, rules and regulations promulgated thereunder by the FCC and/or the state utility commission(s) (“Commission”).

The terms and conditions of this Agreement shall be subject to any and all applicable laws, rules, regulations or guidelines now in effect and that subsequently may be prescribed by any federal, state or local governmental authority. In the event of any amendment of the Act, any effective legislative action or any effective regulatory or judicial order, rule, regulation, arbitration award, dispute resolution procedures under this Agreement or other legal action purporting to apply the provisions of the Act to the Parties or in which the court, FCC or the Commission makes a generic determination that is generally applicable which revises or modifies the applicable law, rules, regulations or guidelines (individually and collectively, “Amended Rules”), either Party may, by providing written notice to the other Party, require that the affected provisions of this Agreement be renegotiated in good faith and this Agreement shall be amended accordingly within 60 days of the date of the notice to reflect the pricing, terms and conditions of each such Amended Rules relating to any of the provisions in this Agreement. Should any term of this Agreement be determined by a court or agency with competent jurisdiction to be unenforceable, all other terms of this Agreement shall remain in full force and effect.

17. **Severability.** If any one or more of the provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions hereof or thereof shall not in any way be affected or impaired thereby. If this Agreement shall be held to be unenforceable against either Party, the enforceability of such agreement against the other Party hereto shall not in any way be affected or impaired thereby.
18. **Dispute Resolution.** KSFIBERNET and CITY plan to use due diligence to work together to implement this Agreement. However, the Parties understand that unforeseen issues and conflicts may arise. It is the intention of the Parties that this Agreement not terminates prior to the expiration of the Term. Rather, the Parties acknowledge their desire to reach a working solution to such issues and conflicts by employing the following dispute resolution process:

(a) To the extent that any issue of or relating to this Agreement cannot be reasonably resolved by KSFIBERNET and CITY, a designated representative of each Party shall meet promptly in an effort to resolve the dispute extra-judicially.

(b) If the dispute is not resolved as a result of such meeting, the dispute shall be immediately referred in writing to the members of senior management of each Party. The members of senior management shall meet to attempt to resolve the dispute within 20 days after the meeting described in paragraph 17(a) above.

(c) No less than 10 days prior to the meeting of senior managers, the Parties shall exchange written statements of the issues in dispute, the facts and evidence supporting each side, and the name of the member of senior management designated and authorized to resolve the dispute.

(d) If the good faith attempts to resolve the dispute as stated in paragraphs 17(a), (b) and (c) are unsuccessful, either Party may start binding arbitration in Overland Park, Kansas. The arbitration will be before a three-arbitrator panel. Each Party will select one arbitrator to represent its interest, at its sole expense. The final arbitrator, who shall be impartial, will be selected by the two partial arbitrators. In the event the two partial arbitrators shall fail to select an impartial arbitrator, either Party may apply to a court of law to have a judge select an impartial arbitrator. The three arbitrators by majority ruling may adopt such procedures as they deem efficient and appropriate for making the determinations submitted to them for adjudication. No statements by, or communications between, the Parties during negotiation or mediation, or both, will be admissible for any purpose in arbitration. Each Party shall bear its internal expenses and its attorney's fees and expenses, and jointly share the cost of the impartial arbitrator. The decision(s) of a majority of the arbitrators shall be final and binding on the Parties.

(e) Notwithstanding the foregoing, either Party may resort to a court by applying for interim relief if such Party reasonably determines that such relief is necessary to prevent irreparable injury to it or to a third Party.

19. **Binding Agreement.** This Agreement, including the attachments, embodies the entire agreement between the Parties hereto and supersedes any prior or contemporaneous oral or written agreements between the Parties, and once this Agreement has been executed, any amendments hereto must be made in writing and signed by both Parties.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed and to become effective as of the date first written above.

**KANSAS FIBER NETWORK, LLC**

**CITY OF GARNETT**

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

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

Name: Steven Dorf

Name: \_\_\_\_\_

Title: President

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**ATTEST:**

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_