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**ORDINANCE NO. 3293**

**AN ORDINANCE GRANTING TO IDEATEK TELCOM, LLC, A CONTRACT FRANCHISE TO CONSTRUCT, OPERATE AND MAINTAIN A TELECOMMUNICATIONS SYSTEM IN THE CITY OF MCPHERSON, KANSAS.**

This Contract Franchise (“Franchise or Agreement”) is entered into as of December 26, 2018 (“Effective Date”) by and between the City of McPherson, Kansas, a municipal corporation (the “City”), and IdeaTek Telcom LLC (“IdeaTek”).

**RECITALS**

A. IdeaTek owns, maintains, operates and/or controls telecommunications and Internet Facilities serving IdeaTek’s customers. Such Facilities are in public rights-of-way (hereinafter “ROW”), among other locations, in the State of Kansas.

B. IdeaTek seeks to enter the City of McPherson’s Right of Way, and other real property of the City, to install, maintain and operate fiber network Facilities (the “Network”), so that IdeaTek and/or its underlying customers (the “Customers”) may provide data, telecommunications, Internet, and related services to the residents and visitors of the City (the “Services”).

**NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF MCPHERSON, KANSAS:**

**SECTION 1. DEFINITIONS.**

For the purposes of this Ordinance the following words and phrases shall have the meaning given herein. When not inconsistent within the context, words used in the present tense include the future tense and words in the single number include the plural number.

a. "Contract Franchise" - means this Ordinance granting the right, privilege and franchise to IdeaTek to provide services within the City.

b. “Distributed antenna systems” (“DAS Facility”) – mean certain components of the Network consisting of distributed antenna systems which may be located on stand-alone poles, and other structures located on or within the ROW as permitted under this Contract Franchise ordinance, and which will be connected IdeaTek’s Facilities.

c. "Facilities" means any portion of a system located in, along, over, upon, under, or through the right-of-way and may include, without limitation, antenna nodes, equipment

cabinets, underground and above ground fiber optic cable, fiber handholes and enclosures, fiber repeaters and related equipment, DAS Facility, and will include other equipment as technology evolves, in a configuration and at locations to be filed and identified through the City permit process

d. "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.

e. "IdeaTek" - means IdeaTek Telcom, LLC, a competitive telecommunications local exchange service provider providing local exchange, Internet services, and other telecommunications services within the City. References to IdeaTek shall also include as appropriate any and all successors and assigns.

f. "Gross receipts" - shall be defined as set forth in K.S.A. 12-2001(c)(6). Uncollectible and late charges, taxes, surcharges, and other pass-through charges shall not be included within gross receipts.

g. "Right-of-way" or "ROW" means the surface and space on, above and below every municipal street, alley, road, highway, lane or City right-of-way dedicated or commonly used now or hereafter for utility purposes, including but not limited to utility easements wherein the City now or hereafter acquires the right and authority to locate or permit the location of utilities consistent with communications facilities. This term shall not include any county, state, or federal right-of-way or any property owned or controlled by any person or agency other than the City, except as provided by applicable laws or pursuant to an agreement between the City and any such person or agency. Right-of-way shall not include property owned or held by City and not typically considered right-of-way such as City parks and City buildings.

## **SECTION 2. GRANT OF CONTRACT FRANCHISE.**

a. There is hereby granted to IdeaTek this nonexclusive Contract Franchise to construct, maintain, extend and operate its Facilities along, across, upon or under any public right-of-way for the purpose of supplying services to the consumers or recipients within the corporate boundaries of the City, for the term of this Contract Franchise, subject to the terms and conditions of this Contract Franchise.

b. The grant of this Contract Franchise by the City shall not convey title, equitable or legal, in the public right-of-way, and shall give only the right to occupy the public right-of-way, for the purposes and for the period stated in this Contract Franchise.

c. This authority to occupy the public right-of-way shall be granted in a competitively neutral and nondiscriminatory basis and not in conflict with state or federal law.

### **SECTION 3. USE OF PUBLIC RIGHT-OF-WAY.**

a. Pursuant to K.S.A. 17-1902, and amendments thereto, and subject to the provisions of this Contract Franchise, IdeaTek shall have the right to construct, maintain and operate its Facilities along, across, upon and under the public right-of-way. Such Facilities shall be so constructed and maintained as not to obstruct or hinder the usual travel or public safety on such public ways or obstruct the legal use by other utilities.

b. IdeaTek shall participate in the Kansas One Call utility location program.

c. This Agreement does not permit IdeaTek to attach anything to City owned poles and does not cover any poles owned by the McPherson Board of Public Utilities ("BPU"). Any pole attachments to BPU poles shall be by separate agreement pursuant to then-existing BPU policy.

d. IdeaTek shall comply with the City's right-of-way permitting process including but not limited to payment of fees.

e. If the City has a utility installation process or permit policy applicable to the installation of the IdeaTek's Facilities, the City will approve or deny any application by the IdeaTek no later than 14-days from submission of a complete application. Failure of the City to deny with reasonable specificity IdeaTek's application within 14-days will be considered approval of the application by the City.

f. IdeaTek will always attempt to provide reasonable notice to the City for any new installation and give the City reasonable time to provide input on the placement/location of new Facilities.

g. No notice is necessary to the City for Facility maintenance unless such maintenance will require street closure, and in such event, IdeaTek will use reasonable efforts to coordinate such closure with the City.

h. Zoning regulations shall not apply to installations within the Public ROW.

i. IdeaTek 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 IdeaTek's construction, installation, maintenance, access, use, repair, replacement, relocation, or removal of the Network in the City's ROW. IdeaTek 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. IdeaTek's obligations under this section 3.h 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 IdeaTek to the City.

j. If IdeaTek Facilit(ies) need to be relocated due to a City improvement, as reasonably determined by the City Engineer, IdeaTek must move their conflicting Facilit(ies) within ninety (90) calendar days from the date of written notice although the City shall reasonably extend such deadline at its sole discretion, in the event that the delay will not materially impact the City improvement project deadline or documented weather delays occur. The City will also make commercially reasonable efforts to notify IdeaTek at the earliest possible date of any potential relocation need even if that notification is greater than ninety (90) days. If IdeaTek fails to move conflicting facilities within such ninety (90) day period plus any permitted extensions, IdeaTek shall pay the City thereafter fifteen hundred dollars (\$1500.00) per day until the conflict is resolved.

#### **SECTION 4. COMPENSATION TO THE CITY.**

a. IdeaTek shall pay right-of-way permitting fees as applicable under City policy.

b. Any other compensation made pursuant to this Contract Franchise ordinance shall be paid on a quarterly basis paid not later than forty-five (45) days after the end of the remittal period. Said compensation shall be a sum equal to five percent (5%) of Gross Receipts.

#### **SECTION 5. RECORD REVIEW.**

The City shall have the right to examine, upon written notice to IdeaTek, no more than once per calendar year, those records necessary to verify the correctness of the compensation paid pursuant to this Contract Franchise ordinance.

#### **SECTION 6. RESOLD SERVICES.**

IdeaTek shall collect and remit compensation as described in Section 4 on those access lines that have been resold to another telecommunications local exchange service provider.

#### **SECTION 7. INDEMNITY AND HOLD HARMLESS.**

a. It shall be the responsibility of IdeaTek to take adequate measures to protect and defend its facilities in the public right-of-way from harm or damage. If IdeaTek fails to accurately or timely locate facilities when requested, in accordance with the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 et seq., it has no claim for costs or damages against the City and its authorized contractors unless such parties are responsible for the harm or damage caused by their gross negligence. The City and its authorized contractors

shall be responsible to take reasonable precautionary measures including calling for utility locations and observing marker posts when working near IdeaTek's facilities.

b. IdeaTek shall indemnify and hold the City and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury (including death), property damage or other harm for which recovery of damages is sought, to the extent that it is found by a court of competent jurisdiction to be caused by the negligence of IdeaTek, any agent, officer, director, representative, employee, affiliate or subcontractor of IdeaTek, or its respective officers, agents, employees, directors or representatives, while installing, repairing or maintaining Facilities in the Public right-of-way.

c. IdeaTek or City shall promptly advise the other in writing of any known claim or demand against IdeaTek or the City related to or arising out of IdeaTek's activities in the Public right-of-way.

#### **SECTION 8. INSURANCE REQUIREMENT.**

a. During the term of this Contract Franchise, IdeaTek shall obtain and maintain insurance coverage at its sole expense, with financially reputable insurers that are licensed to do business in the State of Kansas. Should IdeaTek elect to use the services of an affiliated captive insurance company for this purpose, that company shall possess a certificate of authority from the Kansas Insurance Commissioner. IdeaTek shall provide not less than the following insurance:

(1) Workers' compensation as provided for pursuant to the laws of the state of Kansas with an employers' liability limit equal to the amount required by law.

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

#### **SECTION 9. REVOCATION AND TERMINATION.**

In case of failure on the part of IdeaTek to comply with any of the provisions of this Contract Franchise, or if IdeaTek should do or cause to be done any act or thing prohibited by or in violation of the terms of this Contract Franchise, the City shall abide by the requirements of K.S.A. 12-2001 which requires reasonable notice and an opportunity for a public hearing before the City governing body before a Contract Franchise ordinance may be revoked.

## **SECTION 10. RESERVATION OF RIGHTS.**

a. In granting its consent hereunder, IdeaTek does not in any manner waive its regulatory or other rights and powers under and by virtue of the laws of the State of Kansas as the same may be amended, or under the Constitution of the State of Kansas, nor any of its rights and powers under or by virtue of present or future ordinances of the City.

b. In entering into this Contract Franchise, neither the City's nor IdeaTek's present or future legal rights, positions, claims, assertions or arguments before any administrative agency or court of law are in any way prejudiced or waived. By entering into the Contract Franchise, neither the City nor IdeaTek waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or IdeaTek may have at law or equity, without limitation, to argue, assert, and/or take any position as to the legality or appropriateness of any present or future laws, non-franchise ordinances and/or rulings.

## **SECTION 11. FAILURE TO ENFORCE.**

The failure of either the City or IdeaTek to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Contract Franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by the City or the IdeaTek unless said waiver or relinquishment is in writing and signed by both the City and the IdeaTek.

## **SECTION 12. TERM AND TERMINATION DATE.**

a. This Contract Franchise shall be effective for a term of ten (10) years from the effective date of this Contract Franchise ordinance. Thereafter, this Contract Franchise will renew for additional one (1) year terms, unless either party notifies the other party of its intent to terminate or renegotiate the Contract Franchise at least ninety (90) days before the termination of the then current term. The additional term shall be deemed a continuation of this Contract Franchise and not as a new franchise or amendment.

b. Upon written request of either the City or IdeaTek, this Contract Franchise shall be renegotiated at any time in accordance with the requirements of state law upon any of the following events: changes in federal, state, or local laws, regulations, or orders that materially affect any rights or obligations of either the City or IdeaTek, including but not limited to the scope of the Contract Franchise granted to IdeaTek or the compensation to be received by the City hereunder.

c. If any clause, sentence, section, or provision of K.S.A. 12-2001, and amendments thereto, shall be held to be invalid by a court or administrative agency of competent

jurisdiction, provided such order is not stayed, either the City or IdeaTek may elect to terminate the entire Contract Franchise. In the event of such invalidity, if IdeaTek is required by law to enter into a Contract Franchise with the City, the parties agree to act in good faith in promptly negotiating a new Contract Franchise.

d. Amendments under this section, if any, shall be made by Contract Franchise ordinance as prescribed by statute. This Contract Franchise shall remain in effect according to its terms, pending completion of any review or renegotiation provided by this section.

e. In the event the parties are actively negotiating in good faith a new Contract Franchise ordinance or an amendment to this Contract Franchise upon the termination date of this Contract Franchise, the parties by written mutual agreement may extend the termination date of this Contract Franchise to allow for further negotiations. Such extension period shall be deemed a continuation of this Contract Franchise and not as a new Contract Franchise ordinance or amendment.

**SECTION 13. POINT OF CONTACT AND NOTICES.**

IdeaTek shall at all times maintain with the City a local point of contact who shall be available at all times to act on behalf of IdeaTek in the event of an emergency.

All other notices between the parties shall be in writing and shall be made by personal delivery or by depositing such notice in the U.S. Mail, Certified Mail, return receipt requested. Any notice served by U.S. Mail or Certified Mail, return receipt requested, shall be deemed delivered five (5) calendar days after the date of such deposit in the U.S. Mail unless otherwise provided. "Business day" for purposes of this section shall mean Monday through Friday, City and/or IdeaTek observed holidays excepted.

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| <b>The City:</b><br>City of McPherson, Ks<br>c/o City Engineer<br>400 E. Kansas, PO Box 1008<br>McPherson, KS 67460<br>jeffw@mcpcity.com | <b>IdeaTek:</b><br>IdeaTek Telcom<br>Attn: Contract Notifications<br>PO Box 407<br>Buhler, KS 67522<br>Daniel@ideatek.com |
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or to replacement addresses that may be later designated in writing.

**SECTION 14. CONFIDENTIALITY.**

Information provided to the City under K.S.A. 12-2001 shall be governed by confidentiality procedures in compliance with K.S.A. 45-215 et seq and amendments thereto. IdeaTek agrees to indemnify and hold the City harmless from any and all penalties or costs, including attorney's fees, arising from the actions of IdeaTek, or of the City at the written request of IdeaTek, in

seeking to safeguard the confidentiality of information provided by IdeaTek to the City under this Contract Franchise.

#### **SECTION 15. COMPETITIVE NEUTRALITY**

The City agrees that under K.S.A. 12-2001 and K.S.A 17-1902, and other state and federal laws, this Contract Franchise ordinance must be competitively neutral and may not be unreasonable or discriminatory to any telecommunications provider operating in the City.

#### **SECTION 16. SEVERABILITY.**

If any clause, sentence, or section of this Contract Franchise, or any portion thereof, shall be held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared invalid; provided, however, the City or IdeaTek may elect to declare the entire Contract Franchise invalidated if the portion declared invalid is, in the judgment of the City or IdeaTek, an essential part of the Contract Franchise.

#### **SECTION 17. FORCE MAJEURE.**

Each and every provision hereof shall be reasonably subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond IdeaTek's or the City's control.

#### **SECTION 18. GENERAL PROVISIONS**

- a. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representatives, successors, assigns and transferees.
- b. This Agreement constitutes the entire agreement between the parties relating to the subject matter hereof.
- c. 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 federal court with jurisdiction over McPherson County or the state courts located in McPherson County, Kansas.
- d. 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.



- e. 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.
- f. This Franchise Agreement ordinance is made under and in conformation with and is subject to the laws of the State of Kansas.

**PASSED BY THE GOVERNING BODY**, this 26th day of December, 2018, for the City of McPherson, Kansas.

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Thomas A. Brown, Mayor

ATTEST:

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Tamra K. Seely, City Clerk

IdeaTek Telcom, LLC

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

Daniel Friesen, CIO