

Published in the _____ on _____

BUTLER RURAL ELECTRIC COOPERATIVE ASS'N INC., d/b/a/ VELOCITY

ORDINANCE NO. 2022-03

A CONTRACT FRANCHISE ORDINANCE OF BENTON, KANSAS GRANTING TO BUTLER RURAL ELECTRIC COOPERATIVE ASS'N INC. D/B/A VELOCITY, ITS SUCCESSORS AND ASSIGNS, A FIBER OPTIC FRANCHISE AND PRESCRIBING THE TERMS AND CONDITIONS OF SAID GRANT RELATING THERETO.

BE IT ORDERED BY THE GOVERNING BODY OF BENTON, KANSAS

FRANCHISE AGREEMENT

This Franchise Agreement is made as of this 17th day of October, 2022, by and between the City of Benton, Kansas, a municipal corporation of the third class ("City"), and BUTLER RURAL ELECTRIC COOPERATIVE ASS'N INC., d/b/a/ VELOCITY.

WHEREAS, pursuant to the laws of the State of Kansas and the home rule powers of the City of Benton, Kansas, the authority to use the public rights of way within the City of Benton, Kansas, is vested in the reasonable police and home rule powers of the City to adopt and enforce ordinances necessary to the health, safety and welfare of the public.

WHEREAS Franchisee is a Telecommunications carrier as defined in K.S.A. 66-1,187(m) with authority under K.S.A. 17-1902 to occupy the public right-of-way subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of the City.

WHEREAS Franchisee wishes to place and maintain communication Facilities in certain portions of the City's rights of way.

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 following shall apply:

SECTION 1. - Definitions.

For the purposes of this Franchise Agreement, the following words and phrases shall have the meanings given herein:

Cable service is defined as set forth in 47 U.S.C. Section 522(6), and amendments thereto.

City shall mean the City of Benton, Kansas. References to the City shall also include, as appropriate, any and all successors and assigns.

Facility or facilities means any portion or component of the Network located in, along, over, upon, under, or through the public right-of-way.

Franchise means a grant conveying the right, privilege, and authority to construct, operate and maintain facilities in, through and along the City's right of way for the purposes of supplying communications services.

Franchise fee means the fees established under this Ordinance for each grant of access to the public rights-of-way.

Franchisee means BUTLER RURAL ELECTRIC COOPERATIVE Assn. Inc. d/b/a Velocity authorized to do business in the state of Kansas, a fiber optic provider, providing telecommunications services and/or operating Facilities within the City. References to Franchisee shall also include as appropriate any and all successors and assigns.

Gross receipts mean all revenues received directly or indirectly by a franchisee or its affiliates for services that either originate or terminate within the corporate limits of the city, and all revenue derived from the use of facilities. This term shall be interpreted as expansively as legally permissible and shall incorporate any and all new services, technologies or sources of revenue that may develop over the course of the term of the franchise.

Private party means a non-governmental entity.

Law(s) means 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 any aspect of this Contract franchise or the parties' activities hereunder, whether now existing or hereafter adopted, including but not limited to a city right-of-way management ordinance and the city's zoning and land use laws to the extent they are not inconsistent with state and federal law regulating use of the public rights-of-way, and any related laws, rules, or regulations and amendments thereto relating to the use and occupancy of the public right -of-way.

Provider means a local exchange carrier or a telecommunications carrier as those terms are defined in K.S.A. 66-1,187, and amendments thereto.

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, telecommunication conduits, right-of-way improvements, and other Public Projects.

Public Project means any project planned or undertaken by the City or any other governmental entity for the construction, reconstruction, maintenance, or repair of public facilities or Public Improvements, or for any public purpose.

Network means the Franchisee's fiber network including the cables, wires, lines, conduits, manholes, ducts, appliances, optic fiber, and any associated converters, equipment or other facilities designed, constructed or occupied for the purpose of producing, receiving, amplifying or distributing telecommunications service to or from locations within the City.

Public right(s)-of-way ("ROW") means only the area of real property in which the City has a dedicated or acquired right-of-way interest in the real property. It shall include the area

on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or reacquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts. All definitions not specifically defined herein shall have the meaning ascribed to them by applicable federal, state or local law.

Telecommunications service(s) means providing the means of transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

SECTION 2. - Grant of Franchise.

- (a) For and in recognition of the mutual consideration set forth in this Franchise Agreement, the satisfaction of which is hereby acknowledged by both parties, Franchisee is hereby granted a nonexclusive Franchise to construct, place, replace, repair, maintain, extend, and operate its facilities along, across, upon, under, or in the City's ROW, for the purpose of providing a fiber optic network to provide digital data and/or voice transport.

The City may, in writing, approve amendments to the locations and to the routes of Franchisee's fiber optic facilities, of which approval shall not be unreasonably withheld, conditioned or delayed.

- (b) This Franchise Agreement does not grant Franchisee the authority or right to provide end user Cable Service.
- (c) The grant of this Franchise Agreement shall not convey title, equitable or legal, to Franchisee in the ROW of the City and shall only give to Franchisee the right to occupy the ROW of the City for the purposes and for the time stated in this Franchise Agreement. The Franchise Agreement does not:
- (1) Grant Franchisee the right to use Facilities or any other property, telecommunications-related or otherwise, owned or controlled by the City or a third party, without the valid written consent of the City or the third party.
 - (2) Grant Franchisee the authority to construct, to operate, or to maintain any Facilities and any related appurtenances and improvements thereto on any property owned by the City outside a Right of Way, including but not limited to public parks, City Hall, public works facilities, or other public property. The parties agree that the City and Franchisee shall, if it becomes necessary, enter into separate agreements for the placement of Facilities and any related appurtenances and improvements thereto on any City-owned property not located in a Right of Way.
 - (3) Excuse Franchisee from obtaining appropriate access or attachment agreements before locating its Facilities and any related appurtenances and improvements thereto on any property or facilities owned or controlled by the City or by any third party.

- (4) Grant Franchisee the authority or right to provide additional services for which a separate franchise is required by the City without first obtaining a separate franchise or amending this Franchise Agreement. In particular, this Franchise Agreement does not grant Franchisee the right to provide cable service as a cable operator (as defined by 47 U.S.C. § 522(5)) within the City. Franchisee also agrees that this Franchise Agreement does not permit it to operate an open video system without the payment of fees contemplated by 47 U.S.C. § 573(c)(2)(B) and without complying with all FCC regulations promulgated pursuant to 47 U.S.C. § 573. Franchisee shall not knowingly allow the use of its Facilities by any third party in violation of this subsection or any laws.
- (d) Nothing in this Franchise Agreement shall be construed as giving Franchisee any exclusive rights or privileges.
- (e) Notwithstanding anything herein to the contrary, Franchisee reserves all rights it may have under applicable laws affecting this Franchise Agreement, including but not limited to K.S.A. 12-2001.

SECTION 3. - Use of Public Right of Way.

In using the ROW under this Franchise Agreement, Franchisee shall be subject to all applicable ordinances, resolutions, rules, regulations, and policies now or hereafter adopted or promulgated by the City in the reasonable exercise of its police powers and shall be subject to all applicable laws, statutes, ordinances, regulations, orders, and rules adopted or promulgated by any governing body now or hereafter having appropriate jurisdiction. As a condition of this Franchise Agreement, Franchisee shall obtain and shall be responsible for obtaining and maintaining any necessary permits, licenses, certifications, grants, registrations, or other authorizations required by any appropriate governmental entity, including but not limited to the FCC, the KCC, or the City, subject to Franchisee's right to challenge in good faith such requirement. In addition, Franchisee shall be subject to all applicable ordinances, resolutions, rules, regulations, and policies now or hereafter adopted or promulgated by the City relating to the use of the ROW, including but not limited to permits, sidewalk and pavement cuts, utility location, construction coordination, policies, beautification, tree care, and other requirements affecting the use of the ROW. Franchisee shall also comply with the following:

- (a) Franchisee's use of the Rights of Way shall in all matters be subject and subordinate to the City's use of the ROW for any purpose relating to the health, safety, and welfare and regulations of the City. Franchisee shall coordinate the placement of its Facilities in a manner that minimizes adverse impact on Public Improvements as reasonably determined by the City. Where placement is not otherwise regulated, the Facilities shall be placed with adequate clearance from such Public Improvements so as not to impact or be impacted by such Public Improvements. Franchisee 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 Franchisee in the event of an emergency. Franchisee shall provide the City with the local contact's name, address, telephone number, fax number and e-mail address.
- (b) All earth, materials, sidewalks, paving, crossings, utilities, Public Improvements, or improvements of any kind that are injured, damaged, or removed by Franchisee, while engaging in any activity under this Franchise Agreement, shall be fully repaired or

replaced within a reasonable time by Franchisee at its sole cost and expense and to the reasonable satisfaction of the City.

- (c) Franchisee shall keep and maintain accurate records and as-built drawings depicting the accurate location of all Facilities constructed, reconstructed, located, or relocated in the Rights of Way of the City after the date hereof and shall provide that information to the City upon its request. Such location and identification shall be at the sole cost and expense of Franchisee, without any such cost or expense to the City or its authorized agents and contractors.

City agrees to use any information obtained under this subsection only to locate utility facilities in connection with Public Projects and further agrees not to disclose such information to anyone other than City employees requiring such information to locate utility facilities in connection with Public Projects, except as may otherwise be required by law. The City and Franchisee agree that such information is confidential and proprietary. The City and Franchisee also agree that such information shall remain the sole property of Franchisee. The City and Franchisee further agree that such information shall not constitute an open public record as that term is defined by the Kansas Open Records Act, codified as amended at K.S.A. 45-215 et seq. In the event that the City shall be required to disclose such information, the City shall provide Franchisee advance written notice of its intended disclosure of such information and shall take such action as may be reasonably required to cooperate with Franchisee in safeguarding such information.

Franchisee agrees to indemnify and to hold the City harmless from any and all penalties or costs, including reasonable attorneys' fees, incurred by the City, at the written request of Franchisee, in seeking to safeguard the confidentiality of information provided to the City by Franchisee under this section.

In the event that such information is required by law to be publicly disclosed, then Franchisee shall have no further obligation under this section to provide the City with such information.

- (d) Except in cases of emergency, a minimum of fourteen (14) days prior to construction, reconstruction, location, or relocation of any Facilities in a ROW, Franchisee shall submit to the City Engineer, or his or her designee, for approval, plans and specifications related to the proposed construction, reconstruction, location, or relocation. The City shall not unreasonably withhold, delay, or condition approval of said plans and specification. The City's review of the plans and specifications shall be confined to matters impacting the interests of the City in managing the Rights of Way of the City.
- (e) As reasonably necessary to accommodate City projects (not to include private parties), Franchisee shall relocate or adjust any of its Facilities located in a ROW for a Public Project upon forty-five (45) days written notice from the City. Such relocation or adjustment shall be performed by City at its sole cost and expense reimbursement and shall be subject specifically to the rules and regulations of the City.

Notwithstanding Section 3(e), Franchisee shall not be responsible for the expenses of relocation to accommodate any private party-initiated relocation of its Facilities. The

expenses attributable to such a project shall be the responsibility of the private party upon the request and appropriate documentation of Franchisee. Before such expenses may be billed to the private party, Franchisee shall coordinate with the private party and the City on the design and construction to ensure that the work required is necessary and done in a cost-effective manner. Franchisee may require payment in advance of estimated costs or relocation prior to undertaking any work required to accommodate any installation initiated after the effective date of this Agreement.

- (f) It shall be the sole responsibility of Franchisee to take adequate measures to protect and defend its Facilities in the ROW from harm and damage. If Franchisee fails to accurately or timely locate its Facilities as required under K.S.A. 66-1801 et seq. and City law and regulation, then Franchisee has no claim for costs or damages against the City or its authorized agents and Contractors or any other party authorized to be in the ROW, except to the extent that such harm or damage is caused by such party's negligent or intentional conduct. The City and its authorized agents and Contractors agree to take reasonable precautionary measures, including but not limited to calling for utility locations and observing marker posts, when working near Franchisee's Facilities.
- (g) Except in cases of emergency, Franchisee shall notify the City not less than ten (10) days in advance of any construction, reconstruction, repair, location, or relocation of Facilities that would require any street closure or that would 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.

In addition, all work performed in the traveled ROW that, in any way, impacts vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected. For all work performed within the ROW, Franchisee shall comply with the City's regulations, rules, and orders regarding the placement of signs, barricades, and other safeguards.
- (h) All technical standards governing construction, reconstruction, installation, operation, testing, use, maintenance, and dismantling of the facilities in the Rights of Way shall be in accordance with applicable present and future federal, state, and local laws and regulations.
- (i) The City shall have the authority to prohibit Franchisee's use or occupation of a specific portion of any ROW that is environmentally sensitive, as defined by federal, state, or local law or regulation, or that lies within a previously designated historic district as defined by federal, state, or local law, provided such prohibition is applied in a competitively neutral, non-discriminatory manner.

SECTION 4. - Compensation to the City.

- (a) Franchisee is solely responsible for the payment of all lawful franchise and permit fees in connection with Franchisee's performance under this Agreement.
- (b) In consideration of this Franchise Agreement, Franchisee agrees to remit to the City a Franchise Fee of five percent (5%) of the Franchisee's Gross receipts which are derived from its grant as a Provider of telecommunication services within the corporate boundaries of the

City, including, but not limited to, internet/data access charges or services, including all high-speed and traditional subscriber line charges or services (such as, without limitation, T1, T3, OC3, frame relay, DSL, ISDN, cable modem, special access, FTTP or point to point); revenue from rent, lease, physical use, or co-location of the facilities or a portion thereof for any purpose; late charges, penalties or interest received from customers; sale of accounts receivable; any RF telecommunications service revenue and any other operating revenue derived from leasing, licensing, or otherwise selling or conveying the right to use the Franchisee's facilities, and indefeasible rights of use ("IRU") fees within the City; and all other applicable revenues not listed herein. The Franchisee shall pay its Franchise fee on the first day of the month following the date on the first page of this Franchise Agreement and quarterly thereafter. The Franchisee shall make such payment without requirement for invoice or reminder from the City. No acceptance by the City of any Franchise fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall acceptance of any Franchise fee payment be construed as a release of any claim of the City.

- (c) The Franchise fee required herein shall be in addition to, not in lieu of, all taxes, charges, assessments, licenses, fees and impositions otherwise applicable that are or may be imposed by the City under K.S.A. 12-2001 and 17-1902, and amendments thereto. The Franchise fee is compensation for use of the ROW and shall in no way be deemed a tax of any kind.
- (d) Each franchise fee payment shall be accompanied by a statement showing the manner in which the franchise fee was calculated.
- (e) The franchise fee shall be due on a quarterly basis. The first payment shall be due on the first day of the month following the date on the first page of this Franchise Agreement, without the City being responsible for submitting an invoice. Any franchise fee not postmarked or delivered by the due date shall accrue interest from the due date until received, at the applicable statutory interest rate, as defined in K.S.A. 16-201.
- (f) Within sixty (60) days of the effective date of this contract franchise ordinance, Franchisee shall pay to the City a one-time application fee of one hundred dollars (\$100.00). The parties agree that such fee reimburses the City for its reasonable, actual and verifiable costs of reviewing and approving this contract franchise ordinance. The Franchisee shall reimburse the City for the publication costs related to the adoption or amendment of this Contract franchise.
- (g) The Franchisee shall keep accurate books of account at its principal office in Kansas or such other location of its choosing, for the purpose of determining the amounts due to the City pursuant to this subsection. The City shall have access to, and the right to examine, at all reasonable times, all books, receipts, files, records and documents of the Franchisee necessary to verify the correctness of compensation paid to the City, and to correct the same, if found to be erroneous. The City may only exercise its right to examine the books, receipts, files, records, and documents one time per year at a mutually agreeable time. If the statement of fees paid by the Franchisee is incorrect, the Franchisee shall promptly make payment upon such corrected statement. The City agrees to hold in confidence any non-public information it learns from the Franchisee to the fullest extent permitted by law.
- (h) Any dispute concerning the amount under this section shall be resolved in the manner set forth in K.S.A. 12-2001, and amendments thereto. Subject to any limitations in the

laws of the state of Kansas, the Franchisee's payment obligations shall survive the expiration or termination of this Contract franchise.

SECTION 5. - Indemnification.

- (a) It shall be the responsibility of Franchisee to take adequate measures to protect and defend its Facilities in the ROW from harm or damage. If Franchisee fails to accurately or timely locate its Facilities, when requested, in accordance with the Kansas Underground Utility Damage Prevention Act, K.S.A. 66-1801 et seq., then it has no claim for costs or damages against the City or its authorized contractors, except to the extent such harm or damage is caused by such party's negligence or intentional conduct.
- (b) Franchisee, and any successor or assign, agrees to indemnify, defend, save, and hold harmless the City, its officers, agents, employees, Franchisees, and assigns, from and against all claims, actions, liabilities, damages, costs, expenses, and judgments, including reasonable attorneys' fees, on account of any injury to persons (including death) or damage to property to the extent caused by Franchisee's activities in the ROW under the terms of this Franchise Agreement. This indemnification clause shall not apply to any injury or damage caused by the City's own negligence or intentional conduct or that of its employees, agents, or contractors. This indemnity provision shall extend beyond the termination or expiration of this Franchise Agreement.
- (c) The City and Franchisee shall promptly advise the other in writing of any known claim or demand against Franchisee or the City related to or arising out of the Franchisee's activities in the ROW.

SECTION 6. - Transfer and Assignment.

Pursuant to the written permission of the City, which shall not unreasonably be withheld or delayed, Franchisee shall have the right to assign this Franchise Agreement and the rights and privileges hereby granted to any person, firm, or corporation, and any such assignee, who by accepting such assignment shall be bound by the terms and provisions of this Franchise Agreement. If Franchisee should seek approval to assign this Franchise Agreement, Franchisee 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 Franchise Agreement shall be assignable only in accordance with the laws of the State of Kansas.

SECTION 7. - Notice.

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

If to City: City of Benton, Kansas
 Attn: City Clerk
 154 S Main St., PO Box 388
 Benton, KS 67017

If to Franchisee:

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

SECTION 8. - Term and Termination Date.

- (a) This Franchise Agreement shall be effective for a term of twenty (20) years from the effective date of this Franchise Agreement. Thereafter, this Franchise Agreement will renew for one (1) additional five (5) year term, unless either party notifies the other party in writing of its intent to terminate or renegotiate this Franchise Agreement not less than one hundred eighty (180) days before the termination of the then-current term. The additional term shall be deemed a continuation of the Franchise Agreement and not a new Franchise Agreement or amendment.
- (b) Upon written request of the City or Franchisee, this Franchise Agreement shall be renegotiated at any time upon either of the following events: (i) any change in federal, state, or local laws, ordinances, regulations, orders, or rules that materially affects any rights or obligations of either the City or Franchisee under this Franchise Agreement; or (ii) notice is given not less than one hundred eighty (180) days before the termination of the then-current term.
- (c) If any clause, sentence, section, or provision of K.S.A. 17-1901 et seq., and any amendments thereto, shall be held to be invalid by any court or administrative agency of competent jurisdiction, provided such order is not stayed, either the City or Franchisee may elect to request an amendment to the Franchise Agreement to be consistent with the order, unless the Franchise Agreement cannot be reasonably amended to remain a valid agreement in light of the order, in which event either the City or Franchisee may elect to terminate the entire Franchise Agreement. In the event of such invalidity and termination, if either the City or Franchisee is required by law to enter into a new agreement or an Ordinance Franchise with the other, the parties agree to act in good faith to promptly negotiate a new agreement or an Ordinance Franchise.

SECTION 9. – Default; abandonment; expiration or Termination of contract franchise.

- (a) In case of failure on the part of Franchisee, its successors or assigns, to comply with any of the provisions of this Franchise Agreement, or if Franchisee, its successor or assigns, should do or cause to be done any act or thing prohibited by or in violation of the terms of this Franchise Agreement or law, then Franchisee, its successors or assigns, shall forfeit all rights and privileges granted by the Franchise Agreement and all rights hereunder shall cease, terminate, and become null and void, provided that said forfeiture shall not take effect until the City shall complete the following:

Before the City may proceed to terminate this Franchise Agreement, it shall first serve a written notice as provided by the Notice provisions of this Franchise Agreement, setting forth in detail the conditions of neglect, default, or failure complained of, and Franchisee shall have ninety (90) days after the receipt of such notice in which to comply with the conditions of this Franchise Agreement. If, at the end of such ninety (90) day period, the City deems that the conditions of the Franchise Agreement have not been met and that such Franchise Agreement is subject to cancellation thereunder, then the City shall terminate the Franchise Agreement, unless

compliance with the conditions cannot be reasonably accomplished within said ninety (90) day period, in which event Franchisee shall have such additional time as is reasonably necessary provided Franchisee has commenced the cure within said ninety (90) day period and diligently prosecutes the cure to completion.

- (b) Franchisee, its successors or assigns, may terminate this Franchise Agreement by notifying the City of its intent to terminate not less than thirty (30) days prior to the annual anniversary date of the execution of this Franchise Agreement.
- (c) In the event of forfeiture or termination of the Franchise Agreement under this Section, Franchisee agrees that all compensation paid theretofore to the City shall be forfeited.

SECTION 10. - Rights and Duties upon Termination of Agreement.

- (a) In the event Franchisee ceases to operate and abandons the Network, any Facility, or parts thereof, for a period of ninety (90) days or more, the Franchisee shall, at its sole cost and expense and within ninety (90) days from the date of abandonment, vacate and remove the Network or the abandoned part thereof. If such removal disturbs the facility or adjacent property (including ROW or city real property), the Franchisee shall also, at its sole cost and expense, restore or repair the ROW, each facility, and any adjacent property to its original condition, reasonable wear and tear excepted, and further excepting landscaping and related irrigation equipment or other aesthetic improvements made by the Franchisee to the facility or adjacent property. Alternatively, the City may allow the Grantee, in the City's sole and absolute discretion, to abandon the Network, or any part thereof, in place and convey it to the City.
- (b) Upon expiration or termination of this Contract franchise for any reason, the Grantee shall have the right to remove any and all of its Facilities within sixty (60) days after such termination or expiration, or to transfer any and all of its Facilities to another entity authorized to place facilities in the ROW. The Grantee has the duty, immediately upon any such removal, to restore the ROW from which the Facilities are removed to as good a condition as the same were before removal was performed. If the Grantee fails to remove or transfer its Facilities within sixty (60) days, the City may, at its option, remove any or all of the Facilities at the Grantee's expense, or take ownership of any or all of Facilities for the City's use and/or disposal.

SECTION 11. - Insurance.

- (a) During the initial term, the renewal term, or any other extension of this Franchise Agreement, Franchisee shall 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 Franchisee elect to use the services of an affiliated captive insurance company for this purpose, Franchisee shall obtain and possess a certificate of authority from the Kansas Insurance

Commissioner. Franchisee shall provide not less than the following insurance:

- (1) 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.

- (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 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 named as an additional insured with respect to liability arising from Franchisee's operations under this Franchise Agreement. Franchisee may utilize a combination of primary and umbrella liability insurance policies to satisfy the insurance policy limit requirements herein.
- (b) As an alternative to the requirements of Section 11(a), supra, Franchisee 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 any person for loss or damage from death, personal injury, bodily injury, or property damage occasioned by Franchisee or so alleged to have been caused or to have occurred.
- (c) Franchisee shall, as a material condition of this Franchise 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 without first giving the City thirty (30) days prior written notice. Franchisee 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.

SECTION 12. - Reservation of Rights.

In entering into this Franchise Agreement, neither the City's nor Franchisee'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. By entering into this Franchise Agreement, neither the City nor Franchisee waive any rights, but instead expressly reserve any and all rights, remedies, and arguments the City or Franchisee may have at law or equity, without limitation, to argue, assert and/or take any position as to the legality or appropriateness of this Franchise Agreement or any present or future laws, ordinances, or rulings that may be the basis for the City or Franchisee entering into this Franchise Agreement.

SECTION 13. - Failure to Enforce.

The failure of either the City or Franchisee to insist in any one or more instances upon the strict performance of one or more of the terms or provisions of this Franchise Agreement 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 of this Franchise Agreement shall be deemed to have been made by the City or Franchisee unless said waiver or relinquishment is in writing and signed by both the City and Franchisee.

SECTION 14. - Force Majeure.

No party shall be liable for any failure to perform its obligations where such failure is a result of acts of God, fire, strikes, riots, floods, war, and other disasters or events beyond the City's or Franchisee's reasonable control.

SECTION 15. – Entire Agreement; Modification.

This Contract franchise constitutes the entire agreement between the parties relating to the subject matter hereof. All prior and contemporaneous agreements, representations, negotiations, and understandings of the parties, oral or written, relating to the subject matter hereof are merged into and superseded by this Contract franchise. The parties agree that the provisions in this Contract franchise are the project of joint draftsmanship and that should any of the terms be determined by a court, or in any type of quasi-judicial or other proceeding, to be vague, ambiguous and/or unintelligible, that the same sentences, phrases, clauses or other wording or language of any kind shall not be construed against the drafting party. Any modification or amendment to this Contract franchise shall be of no force and effect unless it is in writing, signed by the parties, and adopted pursuant to the requirements of state law.

SECTION 16. - Severability.

If any provision, section, or subsection of this Franchise Agreement or the application thereof to any person or circumstance is declared invalid by a competent court of law, such invalidity shall not affect other provisions, sections, subsections, or applications of this Franchise Agreement that can be given effect without the invalid provision, section, subsection, or application, and to this end the provisions, sections, subsections, or applications of this Franchise Agreement are hereby declared to be severable.

SECTION 17. - Governing Law.

The terms of this Franchise Agreement shall be governed by the laws of the State of Kansas.

SECTION 18. – Most-Favored Provider.

All of the benefits and terms granted by the City herein are at least as favorable as the benefits and terms granted by the City to any future franchisee of the public ROW engaged in the same or similar business described in this Franchise Agreement. Should the City enter into any subsequent agreement of any kind no matter what nomenclature is attached thereto with any other franchisee during the term of this Franchise Agreement, which Agreement provides for benefits or terms more favorable than those contained in this Franchise Agreement, then this Franchise Agreement shall be deemed to be modified effective as of the date of such more favorable agreement to provide Franchisee with those more favorable benefits and terms. The City shall notify Franchisee promptly of the existence of such more favorable benefits and terms and Franchisee shall have the right to receive the more favorable benefits and terms immediately. If requested in writing by Franchisee, the City shall amend this Franchise Agreement to contain the more favorable terms and conditions.

SECTION 19. - Most-Favored Municipality.

Most-Favored Municipality. Should Franchisee after the Parties' execution and delivery of this Agreement enter into a franchise agreement with another municipality of the same size or smaller than the City in this State, which agreement contains financial benefits for such municipality which, taken as a whole and balanced with the other terms of such agreement, are in the City's opinion substantially superior to those in this Franchise Agreement, the City shall have the right to require that Franchisee modify this Franchise Agreement to incorporate the same or substantially similar superior benefits.

SECTION 20. - Acceptance.

Prior to the effective date of this franchise, the Franchise shall file with the City clerk its acceptance in writing of the provisions, terms and conditions of this Contract franchise, which acceptance shall be duly acknowledged before an officer authorized to administer oaths; and when so accepted, this Contract franchise and acceptance shall constitute a contract between the City and the Franchisee subject to the provisions of the laws of the state of Kansas.

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

CITY OF BENTON



/s/ Tyler Gottschalk, Mayor

ATTEST:



/s/ Joyce Casady, City Clerk

APPROVED AND ACCEPTED:



/s/ Kevin Brownlee, CEO
Butler Rural Electric Cooperative Assn. Inc.